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In The

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Mandatory Victims Restitution Act (MVRA) generally requires federal district courts to order as part of a criminal defendant's sentence "that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1). If a district court refuses to do so, the Crime Victim Rights Act allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). "If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." *Id.* The questions presented are:

1. Whether a sentencing court, confronted with the task of determining victims' losses pursuant to the MVRA, may deny restitution to the victims because it believes that the victims might be able to recoup their losses in an alternative forum.

2. Whether the Eighth Circuit's judgments denying mandamus relief should be reversed and remanded because it failed to provide any reasons for denying such relief, as required by 18 U.S.C. § 3771(d)(3).

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

This case arises from several related criminal prosecutions prosecuted in the U.S. District Court for the District of Minnesota by the United States.

Petitioners, parties that sought restitution in the courts below, are Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, Ltd., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. and Ritchie Capital Management, L.L.C.

Respondents are Thomas Petters, Deanna Lynn Coleman, Robert Dean White, Michael Catain, Larry Reynolds, Harold Alan Katz, and Gregory Malcolm Bell, defendants in the criminal cases; and the United States of America, the plaintiff in the criminal prosecutions from which this case arises. Because this case arises out of mandamus petitions, the United States District Court of the District of Minnesota is nominally a respondent as well.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court rule 29.6, petitioners Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, L.L.C., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd., and Ritchie Capital Management, L.L.C. state that they do not have parent corporations or publicly held companies owning 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Ritchie Special Credit Investments, Ltd., et al., respectfully seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The orders denying relief from the Eighth Circuit (Pet. App. 1 and 3) are unpublished. The relevant opinions from the district court (Pet. App. 6, 19 and 21) are unpublished.

JURISDICTION

The Eighth Circuit issued its orders denying relief on August 3, 2010 and September 24, 2010. Pet. App. 1 and 3. On October 21, 2010 Justice Alito extended the deadline for this petition through December 1, 2010. No. 10A399. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Mandatory Victim Restitution Act ("MVRA") and Crime Victims Rights Act ("CVRA"), codified at

18 U.S.C. §§ 3663A, 3664 and 3771, respectively, are fully reproduced in the Appendix at pages 31-50.

STATEMENT OF THE CASE

Petitioners are several investment funds and the fund manager, who together lost over $165 million as a result of a multi-billion-dollar fraud scheme orchestrated by Thomas Petters. As direct and proximate victims of Petters and his convicted co-conspirators, petitioners were eligible for restitution under the Mandatory Victim Restitution Act ("MVRA") and the Crime Victims Rights Act ("CVRA"). Yet the district court refused to award such restitution, because "[a]t bottom" it believed that petitioners could pursue alternative remedies. Pet. App. 16. The Eighth Circuit then compounded this error, denying mandamus without a written opinion, in direct contravention of the CVRA's requirement that any denials of mandamus regarding restitution must be accompanied by a written opinion explaining why relief was denied.

1. In this case – often called the biggest Ponzi scheme before Madoff – Petters and his co-conspirators bilked their victims by borrowing huge sums evidenced by promissory notes. Petters had built a reputation as an astute and successful businessman in the wholesale "diverting" industry, and owned a number of well-known companies including Polaroid, Fingerhut, and Sun Country Airlines – giving him the credibility and clout to borrow huge

sums from banks and investment funds to leverage various transactions. But as victims later learned, over time, Petters' diverting business, PCI, had ceased making the large wholesale transactions in consumer goods and eventually became a complete fraud; there were no real products changing hands, nor profits being made. Money borrowed from new lenders was used to pay prior lenders.

Between February and May 2008, in the early throes of economic recession and in the midst of an historic credit crunch, petitioners loaned a total of $189 million to Petters and his companies in a series of short term notes, supported by assets of Polaroid Corporation, among other substantial collateral. When Petters' empire crumbled several months later, Petters and his companies owed Ritchie entities more than $165 million exclusive of accrued and unpaid interest. Concurrently with a raid on Petters' offices, the government commenced a civil fraud injunction action, and obtained orders freezing all of the assets of Petters and all of his co-defendants and appointing a receiver. The receivership order was soon amended to include a litigation stay, barring all lawsuits by creditors, victims or others against Petters, his co-defendants, and their companies. This litigation stay remains in effect today. The repeatedly stated purpose of the receivership is to preserve assets for victim restitution.

2. The United States brought federal criminal charges against Petters and his co-conspirators in the U.S. District Court for the District of Minnesota.

Early in the prosecution, the government identified petitioners as victims of Petters' fraud. When Petters' chief co-conspirator, Deanna Coleman, went to the U.S. Attorney's Office and offered her cooperation, she gave them a list of twenty-one institutional lenders, who were owed a total of $3.5 billion (including interest) under the promissory notes which formed the basis of the alleged fraud. Petitioners were on the list. The government's theory at Petters' trial was that Petters' fraud scheme was executed through the sale of these promissory notes from Petters' companies. Promissory notes that Petters issued to petitioners were the subject of testimony at Petters' criminal trial.

Petters was convicted of twenty counts of mail fraud, wire fraud, money laundering, and conspiracy. He was sentenced to 50 years in prison. His co-defendants – Deanna Coleman, Michael Catain, Larry Reynolds, Robert Dean White, Gregory Malcolm Bell, and Harold Alan Katz – all pleaded guilty to various fraud charges and received sentences ranging from 366 days to eleven years in prison. In their plea agreements, each of Petters' co-defendants had agreed that the MVRA "applies and that the Court is required to order the defendant to make restitution," and they asked that the government allow proceeds from any forfeited assets to be used for restitution.

3. The MVRA generally requires a sentencing court to impose restitution to all victims "directly and proximately harmed" as a result of the commission of the offense. 18 U.S.C. § 3663A(a)(2). In the lead case,

United States v. Petters, D. Minn. No. 08-364 (RHK/AJB), the district court outlined an *in camera* restitution claim and objection process, and set a date for a restitution hearing two months after Petters' sentencing. Petitioners and other putative victims filed victim impact statements and claims, and the U.S. Attorney's Office compiled preliminary and final proposed restitution orders. The government included petitioners among its proposed restitution list.[1]

The district court, however, refused to order restitution to petitioners or any other victim. Despite the word "[m]andatory" in the title of the MVRA, the district court reasoned that the MVRA "signal[s] that the Court need not – and *should* not – undertake th[e] task [of restitution] under the circumstances here." Pet. App. 12 (emphasis in original). Specifically, the district court observed that under the MVRA's "complexity exception," a court need not impose restitution:

> if the court finds, from the facts on the record, that determining complex issues of fact related to the cause or amount of the victim's

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[1] In addition to the direct victims identified at Petters' trial, the government's proposed restitution list also included hundreds of "indirect victims" who were not direct lenders to the Petters' Ponzi scheme, but rather equity investors in investment funds that loaned money to Petters, including funds that had netted profits from the Petters' scheme. Petitioners objected that indirect victims should not be included because the MVRA limits its definition of victims to those "directly and proximately harmed." The district court never ruled on this motion.

> losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B). In the district court's view, this provision "call[ed] for 'a weighing of the burden of adjudicating the restitution issue against the desirability of *immediate* restitution – or, otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies.'" Pet. App. 16 (quoting *United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996)).

Applying this balancing test, the district court first asserted that "[d]etermining the validity of the amounts claimed by each victim on the Government's final proposed restitution list . . . would take significant time and would be inherently complex." Pet. App. 14. The court then noted, on the other hand, "that alternative avenues of recovery are available to victims" here because: (1) the government has suggested that "absent a restitution order," it would institute proceedings to "remit forfeited assets"; and (2) victims might recover money in "bankruptcy proceedings involving [Petters'] companies." Pet. App. 15-16. "Hence," the district court continued, "victims have several means to recoup their losses other than restitution, before decision-makers better equipped to

resolve their claims." Pet. App. 16. The court then declined to order restitution.

The court later entered two more orders denying restitution in the co-defendants' cases for the same reasons. Pet. App. 19 ("[T]he Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the remission process. . . ."); Pet. App. 22 (same).

Petitioners filed motions objecting to these denials of restitution, arguing that they denied them their rights under the MVRA and the CVRA. Operating under an *ad hoc* victim motions screening process that the district judge apparently created for this case only, the district court initially ignored and later denied the motions on the record. Pet. App. 23, 27.[2]

3. When a district court has denied a victim's request for restitution, the CVRA allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). Accordingly, Ritchie filed timely mandamus petitions in the Eighth Circuit from each of the district court's orders denying restitution.

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[2] Victims were not allowed to e-file motions to the district court. Instead, each document presented by a victim to the clerk's office for filing was instead sent to Judge Kyle's chambers. Judge Kyle would then decide whether the clerk should file it or not. Petitioners' motions asking the court to vacate its orders denying restitution were among the victim motions handled in this manner. At co-defendant Deanna Coleman's sentencing, the district court acknowledged on the record the receipt of petitioners' motions and denied them *nunc pro tunc*.

The CVRA provides that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit, however, responded to each of petitioners' petitions with the following: "The petition for writ of mandamus has been considered by the court and is denied." Pet. App. 1, 3-4.

REASONS FOR GRANTING THE WRIT

This case seeks enforcement of victims' rights conferred upon them by the Mandatory Victim Restitution Act of 1996 and the Crime Victims Rights Act of 2004. These two statutes made revolutionary changes in the way business should be done in criminal courts – for the first time, giving crime victims enforceable rights in criminal cases. Yet federal courts are now divided over a fundamental issue that arises in implementing these new statues: whether courts may deny restitution based on a belief that the victims have alternative avenues in which they could obtain relief. This Court should use this case – in which petitioners suffered over one hundred million dollars of monetary losses as a direct result of a criminal Ponzi scheme but the district court denied restitution on the ground that "alternative avenues of recovery are available to victims," Pet. App. 15 – to resolve this conflict. The very point of the MVRA, absent tightly circumscribed exceptions, is to impose a *mandatory* requirement

that courts impose restitution. Allowing courts to abdicate that duty based on speculation that victims might obtain recompense some other way would effectively render the Act a nullity, for victims have always had the right to pursue alternative avenues of relief.

At the very least, this Court should reverse the Eighth Circuit's unreasoned denial of petitioners' mandamus petition on the ground that it flouts the CVRA's requirement that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit's decision not only deprived petitioners of any meaningful appellate review but is so contrary to plain statutory requirements that summary reversal would be appropriate.

I. This Court Should Resolve The Circuit Split Over Whether Courts May Deny Restitution Based on the Availability of Other Remedies for Possible Victim Compensation.

A. The Circuits Are Split Over This Issue.

The MVRA requires a sentencing court to impose restitution unless, as is pertinent here, "the court finds, from the facts on the record, that determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to

provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3)(B). Invoking this so-called "complexity exception," the district court here held that the burden of determining the amount of restitution due would outweigh "the need to provide restitution" because "alternative avenues of recovery are available to victims." Pet. App. 15. This reasoning and holding – which the Eighth Circuit summarily ratified, Pet. App. 1 & 3, and which comports with prior case law from that district court[3] – implicates an acknowledged circuit split over whether a court may deny restitution under the MVRA based on the availability of other remedies for possible victim compensation.

1. The Ninth Circuit has held that the availability of alternative remedies may *not* be considered in declining restitution under the complexity exception. In *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), the district court denied restitution, as here, in part because it believed the victims could obtain relief in an alternative forum. The Ninth Circuit squarely rejected the district court's belief that this was permissible under the MVRA:

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[3] In *United States v. Kline*, 199 F. Supp. 2d 922, 923-928 (D. Minn. 2002), after awarding restitution to victim individuals the court declined restitution for corporate victims by invoking the complexity exception and telling corporate victims they could pursue a private lawsuit, and that if no assets remained after forfeiture the corporate victims could petition for remission to collect their judgments.

> [U]nder the MVRA the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution. . . . Thus, the district court abused its discretion by relying on the perceived complexity of the restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income.

Id. at 1163; *see also United States v. Edwards*, 595 F.3d 1004, 1013 (9th Cir. 2010) (holding that a prior bankruptcy settlement does not preclude restitution under the MVRA because the MVRA requires restitution in the full amount of the victims' losses and the "settlement did not compensate [the] victims in the full amount they lost at his hands").

The Fourth Circuit has similarly rejected a defendant's request to reduce his restitution obligations by the value of forfeited property that might be made available to victims through a future remission proceeding. *United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000). The Fourth Circuit reasoned that whatever amount victims might receive through remission could only be used as an offset, noting that a restitution offset provided by "§ 3664(j)(2), by its terms, only comes into play after the district court has already ordered restitution in the full amount of the victim's loss." *Id.*

Finally, the First Circuit has held that a bankruptcy award, discharge or settlement cannot be taken into account in determining restitution under

the MVRA. *United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007). Relying on the MVRA's provision making restitution mandatory "[n]otwithstanding any other provision of law," 18 U.S.C. § 3663A, the court ruled that "neither Massachusetts law nor the Bankruptcy Code restricts the reach of the MVRA's clear language." *Hyde*, 497 F.3d at 108. If a prior bankruptcy discharge or settlement of the victim's loss cannot preclude an award of restitution under the MVRA's complexity exception, it follows that the availability of a possible remedy in a pending bankruptcy action is also irrelevant to the balancing analysis that the exception contemplates.

2. Expressly acknowledging that it disagreed with the Ninth Circuit on the issue, the Tenth Circuit has held a district court may decline to order restitution under the MVRA's complexity exception based on the availability of other remedies. *United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008). Rejecting the government's argument to the contrary, the Tenth Circuit reasoned: "While the availability of other relief is deemed irrelevant to the process of calculating the *amount* of a restitution award, it is not necessarily irrelevant to the *availability* of such an award under § 3663A." *Id.* at 1254. The Tenth Circuit thus upheld a district court's denial of restitution based in part on the availability of alternative remedies, explaining that the availability of such remedies was "relevant to the balancing test established by § 3663A(c)(3)(B)'s complexity exception" because it "lessen[s] to some degree" a victim's "need to rely

upon the sentencing process for compensation." *Id.* at 1254.

Judge Tacha wrote separately to say that although she agreed with the court's disposition on other grounds, she disagreed with its interpretation of the MVRA: "I would . . . hold that a court may not consider other sources of compensation in invoking the [MVRA's complexity] exception. In addition, because the district court in the present case clearly considered the FDIC's pending civil suit in deciding whether to apply the exception, I would hold that the court committed a legal error." *Id.* at 1255 (Tacha, J., concurring).

District courts in the Second, Third, and Sixth Circuits also have held, like the Tenth Circuit, that a court may consider availability of alternative remedies as part of the MVRA's complexity exception's balancing test. *See United States v. Schwartz*, 2006 U.S. Dist. LEXIS 33806, at *17-21 (D. Conn. May 25, 2006) (balancing burden that determining restitution would impose against the burden "that would be imposed on the victim by leaving him or her to other available legal remedies"); *United States v. Collardeau*, 2005 U.S. Dist. LEXIS 45020, at *22-23 (D.N.J. Apr. 28, 2005) (denying restitution because determining the cause and amount of losses "would prolong an already lengthy sentencing period" and "[t]hese issues are better left to the civil securities fraud action pending in the Southern District of New York"); *United States v. Warshak*, 2008 U.S. Dist. LEXIS 85888, at *2-3 (S.D. Ohio Aug. 27, 2008) (denying restitution

because "C.F.R. Part 9 provides a process whereby victims may petition for the remission of forfeited property").

B. This Issue Is Extremely Important to the Proper Operation of the MVRA.

For two primary reasons, the question presented here – whether a court may deny restitution based on the availability of other alternative remedies – is extremely important.

1. The question arises frequently, and allowing courts to deny restitution based on the availability of alternative remedies threatens to drain the MVRA of any vitality. An alternative remedy of some kind almost always exists for crime victims who are eligible for restitution under the MVRA. In order to qualify as a victim entitled to restitution under the MVRA, the person "must have standing to bring a civil action for the . . . injuries proximately caused by . . . the conduct underlying the offense of conviction." *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (internal quotation marks omitted); *accord United States v. Reifler*, 446 F.3d 65, 137 (2d Cir. 2006). Accordingly, now as before the enactment of the MVRA, bringing a civil action is always a theoretical possibility for a crime victim. Furthermore, the remission process, whereby a Department of Justice official decides victim petitions and has discretion to remit to victims some of the ill-gotten gains it has seized and forfeited from criminal defendants, exists in all federal criminal

cases in which forfeiture is awarded. Finally, especially in white collar cases, defendants or some of their companies sometimes find themselves in bankruptcy proceedings, where victims can seek to recover a portion of their losses.

The very purpose of the MVRA, however, is to relieve victims of having to pursue these assorted alternative remedies. Prior to its enactment, courts had the authority to impose restitution, but all too often they declined to do so. Under the press of heavy case loads, courts simply did not want to bother with restitution. *See, e.g., United States v. Vaknin,* 112 F.3d 579, 582 (1st Cir. 1997) (noting that, prior to the MVRA, courts invoked their power to impose restitution "sparingly"). The MVRA seeks to correct that situation by *compelling* sentencing courts to award restitution when imposing criminal sentences. *United States v. Aguirre-Gonzalez,* 597 F.3d 46, 51 (1st Cir. 2010); *see also United States v. Perry*, 360 F.3d 519, 530 (6th Cir. 2004) (describing this "fundamental shift" that MVRA imposed). Hence, if the MVRA's complexity situation were to allow district courts to shirk that new responsibility upon a mere finding of complexity, then work Congress invested in enacting the MVRA would be all for naught. Sentencing courts, just as before the MVRA, could simply require victims to pursue their own remedies in any case in which the courts believe determining restitution would be burdensome.

2. Alternative remedies typically fall far short of the MVRA's guarantee of a restitution award for

the "full amount of each victim's losses," 18 U.S.C. § 3664(f)(1)(A), and the CVRA's guarantee of "full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6). Bringing a civil suit can cost substantial money and can take years to generate relief – especially if victims want to obtain a judgment making them whole instead of a settlement giving them a fraction of what they are due. And it sometimes takes years for victims even to be allowed to bring civil suits; when faced with widespread and large-scale harm, district courts can freeze wrongdoers' assets and stay civil litigation until all criminal proceedings are complete.

The remission remedy, for its part, is a matter of executive grace, over which the Attorney General exercises unreviewable discretion. Remission petitions are decided by the chief of the Justice Department's Asset Forfeiture and Money Laundering Section ("AFMLS") – without a hearing. Among other requirements, the victim must demonstrate that he "does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property." 28 C.F.R. § 9.8(a)(5). Remission regulations further allow the chief of AFMLS to give preference to some victims over others, based on perceived need. Awards may be made to law enforcement agencies, 28 U.S.C. § 524(c)(1)(C), and even to informants, who may be paid up to 25% of the proceeds of forfeiture. 19 U.S.C. § 1619(a). Those amounts to law enforcement may be paid out of the gross forfeiture proceeds before victims are

compensated at all. Victim-petitioners may not appeal adverse decisions to any court.

Finally, when victims pursue recovery through bankruptcy proceedings, they typically have access to only a slice of a wrongdoer's assets. Even within that slice, distribution rules can vary dramatically from restitution proceedings. What is more, bankruptcy is a potential remedy that one might call a "one shot deal." Victims can recover only from the wrongdoer's pool of *then-existing* assets. "Restitution liability," by contrast, "lasts for 20 years after incarceration (or until defendant's death)," *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998) and is non-dischargeable in bankruptcy. *Id.*

3. This case vividly illustrates these shortcomings. The victims of the Petters' Ponzi scheme did not have the option of filing civil suits against the defendants to recover their losses. At the outset of the criminal litigation, the government filed a civil fraud injunction and receivership action pursuant to 18 U.S.C. § 1345, and the court imposed a litigation stay preventing anyone from suing any of the defendants. That litigation stay remains in effect today.

Consequently, the "alternative avenues of recovery" the district court relied upon in denying restitution were limited to the pending bankruptcy cases and the remission process. Pet. App. 15-16. Yet here there are several pending bankruptcy cases involving Petters' companies. Each bankruptcy estate had its separate set of secured and unsecured creditors, and

in many instances direct victims of Petters' and his co-conspirators' fraud would have claims against only one of them. As things now stand, the assets in the bankruptcy estates fall far short of an amount sufficient to make victims whole, and once those debts are discharged in bankruptcy, without restitution orders victims will have no further recourse.

In addition, the pending bankruptcy cases will not reach the personal assets of Petters and his co-defendants, which are being held in the separate receivership action. None of the individual defendants have declared bankruptcy, and because the receivership litigation stay is still in effect, their victims cannot force them into bankruptcy. Thus, all of Petters' and his co-defendants' personal assets in the receivership estate – comprising $10-$50 million in assets – exist outside the bankruptcy estates. The coordination agreement that the district judge approved in the receivership case forfeits these assets to the federal government, which was not a victim of the fraud scheme.

It is true, as the district court suggested, that "through the remission process victims will have the opportunity to seek restitution from the same funds from which Court-ordered restitution would be made" – that is, the funds forfeited to the federal government. Pet. App. 15. But that is all petitioners have: the *opportunity to seek* compensation from the Justice Department in the remission process. Petitioners, like any victims, have no statutory right to remission at all. In the receivership case the prosecutor submitted

a letter from the AFMLS Chief, stating that "AFMLS intends to authorize the return of the *net proceeds* forfeited in this case to qualified victims." *United States v. Petters*, No. 08-CV-5348, Doc. 1454-1 (emphasis added). By using "net proceeds" instead of "gross proceeds" the government signaled that it intends to pay law enforcement costs first, before any discretionary awards to victims.

Finally, even if petitioners could obtain some money from a bankruptcy court or some amount of remission from the government, they could not obtain relief that would be enforceable against Petters' or his co-defendants' future earnings and assets. In particular, four of the co-defendants received sentences of less than seven and one-half years in prison. Two were sentenced to 366 days (meaning they will be eligible for good time credit and could be released within ten and one-half months). Unless petitioners are able to secure relief though a restitution order, these defendants will be released from prison debt-free, long before their income-earning years come to an end.

C. The Courts Below Erred in Denying Restitution Based on the Possibility of Alternative Remedies.

The Eighth Circuit's decision condoning the district court's denial of restitution based on the availability of alternative remedies contravenes the text, structure, and purpose of the MVRA.

The MVRA's complexity exception allows courts to forego imposing restitution only if they find that the burden of determining the proper amount of restitution outweighs "the need to provide restitution to [a] victim." 18 U.S.C. § 3663A(c)(3)(B). The plain import of this language is that courts may weigh the burden of calculating restitution only against whether a victim's losses are so insubstantial or speculative that restitution is not important. The question of whether a victim who has suffered substantial losses could try to recover those losses in some other forum is irrelevant to this equation.

Other provisions of the MVRA confirm this analysis. As an initial matter, the MVRA requires courts to impose restitution "[n]otwithstanding any other provision of law." 18 U.S.C. § 3663A(a)(1). Accordingly, the possibility that another provision of law might allow a victim to seek compensation is irrelevant to whether a court must award restitution.

More specifically, subsection 3664(f)(1)(B) of the MVRA provides that "[i]n no case shall the fact that a victim has received or is entitled to receive compensation for a loss from insurance or any other source be considered in determining the amount of restitution." 18 U.S.C. § 3664(f)(1)(B). This prohibition against considering whether a victim "is entitled to receive compensation . . . from any other source" obviously covers alternative remedies. The Tenth Circuit tried to avoid the import of this provision by asserting that it applies only to determining the *amount* of restitution, not to *whether* restitution should be awarded in

the first place. *Gallant*, 537 F.3d at 1254. But as Judge Tacha responded in her separate opinion, this parsing of the statutory language makes no sense: if courts cannot reduce a restitution award to some lower amount based on the availability of alternative remedies, they surely cannot reduce such an award to zero by denying restitution altogether on this ground. *Id.* at 1255 (Tacha, J., concurring).

Indeed, as suggested just above, considering the availability of alternative remedies in conducting the balancing that the MVRA's complexity exception requires would defeat the whole purpose of the MVRA, as well as the CVRA's provisions relating to restitution. The objective of the MVRA is to "ensure" that courts award restitution, *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010), in contrast to the previous system in which courts had discretion over whether to do so or to simply leave victims to seek compensation on their own. The CVRA likewise emphasizes that victims have "[t]he *right* to full and timely restitution as provided by law." 18 U.S.C. § 3771(a)(6) (emphasis added). If courts, just as before the enactment of these major pieces of legislation, could deny restitution whenever they believed, on balance, that leaving crime victims to seek alternative remedies was a reasonable result, then the MVRA and CVRA would have accomplished nothing.

The district court's own reasoning here proves the point. The district court claimed the authority to consider the availability of alternative remedies as a factor in the MVRA's complexity exception based on

the Third Circuit's opinion in *United States v. Kones*, 77 F.3d 66 (3rd Cir. 1996). *See* Pet. App. 13-14, 16. The Third Circuit stated there that courts should "weigh[ ] the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Kones*, 77 F.3d at 69. The Third Circuit, however, was discussing *the pre-MVRA discretionary restitution statute*, 18 U.S.C. § 3663 (1982), under which the availability of alternative remedies was a legitimate consideration.[4] The district court overlooked this fact and, by doing so, rendered the MVRA a nullity.

II. The Eighth Circuit Flouted The CVRA's Written-Opinion Requirement By Denying Petitioners' Mandamus Petitions Without a Written Opinion.

When a district court denies a victim's request for restitution, the CVRA allows the victim to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). The CVRA further provides in the same provision that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be

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[4] The statute that *Kones* construed *prohibited* courts from imposing "restitution with respect to a loss for which the victim has received *or is to receive compensation*." 18 U.S.C. § 3663(e) (1982) (emphasis added).

clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

Senator Jon Kyl of Arizona (with two co-authors) explained in a recent law review article that the purpose of this provision of the CVRA is to ensure that victims may obtain appellate review of denials of restitution and to ensure that courts of appeals take these appeals seriously. *See* Jon Kyl et al., *On The Wings Of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 587 (2005). As Senator Kyl further made clear on the Senate floor in support of the CVRA's passage: "[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights." 150 Cong. Rec. S10912.[5] A written opinion, of course, also enables meaningful review by a higher court regarding whether the court properly interpreted and applied the MVRA.

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[5] In other contexts, the mandamus remedy is an extraordinary and discretionary remedy. The CVRA alters this general rule and mandates that the writs be "take[n] up and decide[d]." This is consistent with the CVRA's goal of testing the rights established and creating a body of case law construing them.

Kyl, Twist & Higgins, p. 619.

The Eighth Circuit, however, responded to each of petitioners' petitions for mandamus with the following: "The petitions for writ of mandamus have been considered by the court and are denied." Pet. App. 1, 4. It did this despite petitioners' having explained in their final mandamus petition that "[p]ursuant to the Crime Victims Rights Act, . . . '[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.' 18 U.S.C. § 3771(d)(3)." Petrs. CA8 Br. 4.

This defiance of federal law is inexcusable and demands reversal – either in conjunction with plenary review and a ruling on the merits of the first question presented or at least on its own. If this Court takes the latter approach, summary reversal may be appropriate.

Other courts of appeals have had no difficulty understanding and abiding by the CVRA's written-opinion requirement. *See, e.g., United States v. Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (denying mandamus in written opinion and noting at the outset that "if we deny the relief sought, 'the reasons for the denial shall be clearly stated on the record in a written opinion'") (quoting § 3771(d)(3)); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52 (1st Cir. 2010) (same). This Court should require the Eighth Circuit to abide by this law as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

RESPECTFULLY SUBMITTED this 1st day of December, 2010.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3050

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; Ritchie Multi-Manager Trading, Ltd.; Ritchie Structured Multi-Manager, Ltd.

Petitioners

Appeal from U.S. District Court
for the District of Minnesota – St. Paul

(0:08-cr-00364-RHK-1)

(0:08-cr-00299-RHK-1)

(0:08-cr-00302-RHK-1)

(0:08-cr-00304-RHK-1)

(0:08-cr-00320-RHK-1)

(0:09-cr-00243-RHK-1)

(0:09-cr-00269-RHK-1)

JUDGMENT

Petition for writ of mandamus has been considered by the court and is denied.

September 24, 2010

Order Entered at the
Direction of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[ROGER L. WOLLMAN,
LAVENSKI R. SMITH
and DUANE BENTON]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-2286

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; and Ritchie Capital Management, L.L.C.

Petitioners

No: 10-2365

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; and Ritchie Capital Management, L.L.C.

Petitioners

No: 10-2582

In re: Ritchie Capital Management, L.L.C.; Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading,Ltd.; Ritchie Capital Management, Ltd.; Ritchie Multi-Manager Trading, Ltd.; and Ritchie Structured Multi-Manager, Ltd.

Petitioners

Appeal from U.S. District Court
for the District of Minnesota – St. Paul
(0:08-cr-00364-RHK-1)
(0:08-cr-00299-RHK-1)
(0:08-cr-00302-RHK-1)
(0:08-cr-00304-RHK-1)
(0:08-cr-00320-RHK-1)
(0:09-cr-00243-RHK-1)
(0:09-cr-00269-RHK-1)

JUDGMENT

The petitions for writ of mandamus have been considered by the court and are denied.

The motions for stay are also denied. The mandates shall issue forthwith.

August 03, 2010

Order Entered at the
Direction of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[ROGER L. WOLLMAN,
LAVENSKI R. SMITH
and DUANE BENTON]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, v. **Thomas Joseph Petters,** Defendant.	Docket No. 08-CR-364 (RHK/AJB) **ORDER**

This matter is before the Court *sua sponte*.

Following the Defendant's conviction, the Government moved to defer the issue of restitution[1] until 60 to 90 days after sentencing. (*See* Doc. No. 370.) This was due to the "complexity, duration, and scope of the offense," which made "identification of all victims and their respective losses" difficult to determine. (*Id.* at 1.)[2] Pursuant to its authority under 18 U.S.C. § 3664(d)(5), the Court granted the Government's Motion and continued the restitution issue for

[1] The term "restitution" means "the act of making good or giving equivalent [value] for any loss, damage, or injury." Black's Law Dictionary 1313 (6th ed. 1990). Under the Mandatory Victims Restitution Act ("MVRA"), defendants convicted of certain crimes are required to make restitution to their victims, with limited exceptions discussed in more detail below. *See* 18 U.S.C. § 3663A.

[2] The Defendant was convicted of twenty counts of mail fraud, wire fraud, money laundering, and conspiracy in connection with a multi-billion-dollar Ponzi scheme lasting more than a decade.

60 days following sentencing, to June 9, 2010. (*See* Doc. No. 375.)

The Government later requested that the Court set a "restitution schedule." Noting the "complexity" of the issue, it asked the Court to approve a schedule requiring the Government to submit a preliminary restitution order six weeks before the restitution hearing, after which victims would be permitted to object, the Government and the Defendant could respond to the objections, and the Court would then consider the objections at the hearing. (*See* Doc. No. 393.) In light of "the complexity and nature of the [victims'] claims," the Court approved this schedule by Order dated April 8, 2010 (Doc. No. 398).

Meanwhile, the United States Probation Office prepared the Defendant's pre-sentence investigation report ("PSI"). The PSI included a victim list identifying the individuals and entities purportedly entitled to restitution as a result of the Defendant's fraud. Although the PSI indicated that "the total amount of restitution is at least $1.8 billion," the losses contained on the victim list totaled slightly under $900 million. This discrepancy was due to the fact that no loss amount was specified for approximately half of the individuals/entities identified as victims.[3] Neither

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[3] By the Court's count, there were 338 victims identified on the victim list appended to the PSI, running the gamut from individuals to hedge funds, retirement funds, and other sophisticated investment entities.

the PSI nor the victim list contained any indication how the loss amounts were calculated or where the documents supporting the loss figures could be found, and no documents substantiating the amounts were submitted with the PSI.[4]

On April 28, 2010, the Government filed its proposed preliminary restitution order, attaching a list identifying 434 victims seeking just under $2 billion in restitution. The victim list differed in several ways from that appended to the PSI, including identifying new victims, removing others, increasing the amount sought for some victims, and decreasing it for others. As an example, the amount sought for one victim dropped by approximately *$90 million*. Despite the additional time the Government had requested before submitting its preliminary order, it provided no explanation for these changes and acknowledged that the list was "based on information that is currently available," which "[i]n some instances . . . may be incomplete." (Doc. No. 410 at 2.)

Pursuant to the Court's restitution schedule, victims were then afforded the opportunity to object

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[4] By way of reminder, the trial in this action lasted approximately five weeks and involved scores of boxes (and millions of pages) of documents. See Fed. R. Crim. P. 32(b)(1)(B) (probation officer must "conduct an investigation and submit a report that contains sufficient information for the court to order restitution"); 18 U.S.C. § 3664(a) (PSI shall contain "information sufficient for the court to exercise its discretion in fashioning a restitution order," including "a complete accounting of the losses to each victim").

to the preliminary restitution order; nearly 100 did so. In response, the Government has now filed its "final" proposed restitution order, along with the objections. While the Government has "accepted" many objections and "not accepted" others, the record does not provide much (if any) information about the basis for the objections or the Government's reasons for accepting/rejecting them. For instance, the Government has removed from the victim list one objector who it claims was a "net winner."[5] The Court, however, has not been directed to any documents or other evidence to support that conclusion.

Moreover, the "final" victim list contains approximately 40 additional victims not previously disclosed, and the amount of restitution sought has increased or decreased in several instances without any obvious explanation. The total amount of restitution is now more than $500 million greater than that on the preliminary list.

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[5] Victims were determined using a "cash in/cash out" method. In other words, the Government looked at the funds "provided by an investor to the Petters fraud (directly or through investment funds) less any payment received by the investor." (Doc. No. 456 at 1-2.) If this amount was greater than zero – that is, if the investor provided more money to the fraud scheme than he/she/it received back – then the investor would be deemed a victim. If, on the other hand, the amount of money received from the fraud exceeded that invested, then the investor would be a "net winner" and, accordingly, would not be deemed a victim under the Government's calculus.

The Government has attempted to provide some explanations for these changes, but many leave the Court wanting. For example, one victim's initial claim was more than $320 million, which was reduced to approximately $139 million on the Government's preliminary victim list. With its final list, however, that victim (and its large claim, which accounts for over 5% of the restitution total) has been deleted entirely. The Government's ostensible basis for doing so is the following cursory explanation: "Claim withdrawn." Besides having difficulty accepting that one would be willing to easily forego a nine-figure sum, the Court finds nothing in the record to support the assertion that the victim has decided to drop its restitution claim.

These are but a handful of examples demonstrating why a restitution order is a thorny proposition here. Putting aside that determining precisely who is a "victim" is itself a challenge,[6] the Court has not

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[6] Under the MVRA, a "victim" is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2). A person who suffers incidental or consequential damages is not a "victim" under the statute. *United States v. Refert*, 519 F.3d 752, 759 (8th Cir. 2008). Here, it is questionable whether investors in hedge funds that in turn invested in the Defendant's fraud – so-called "indirect investors" – are "victims" under the statute. Given how broadly the Eighth Circuit construes the term "victim," however, the Court believes that "indirect investors" fall within the statutory definition. See, e.g., *United States v. Waldner*, 580 F.3d 699, 710 (8th Cir. 2009) ("We take a broad view of what conduct and related loss amounts can be included.") (quoting *United*

(Continued on following page)

been provided with sufficient information to verify whether the amounts sought by the victims are accurate. The Court cannot blindly accept the Government's representations as to loss without some evidentiary basis, even if the amounts sought are unobjected to. Rather, "[w]hen an MVRA victim is identified, the government must prove 'the amount of the loss sustained by [the] victim as a result of the offense' by a preponderance of the evidence." *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008) (quoting 18 U.S.C. § 3664(e)); *accord, e.g., United States v. Young*, 272 F.3d 1052, 1056 (8th Cir. 2001) (vacating restitution award based upon victim's estimated lost profits incorporated into pre-sentence investigation report, even though the victim opted not to testify at restitution hearing, because government failed to sustain its burden of proof). Restitution "by its nature requires the calculation of [the] precise dollar amount" lost by each victim, *United States v. Moore*, 315 Fed. Appx. 16, 20 (9th Cir. 2008) (Bea, J., dissenting); *accord, e.g., Young*, 272 F.3d at 1056 (vacating restitution award based on "uncertain estimate"),[7] because the Court cannot order restitution in an amount greater than the victims' losses, 18 U.S.C. § 3664(f)(1)(A). The record here simply does

States v. DeRosier, 501 F.3d 888, 896 (8th Cir. 2007)); *United States v. Piggie*, 303 F.3d 923, 928 (8th Cir. 2002).

[7] But see *United States v. Gallant*, 537 F.3d 1202, 1252 (10th Cir. 2008); *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997).

not suffice for the Court to make that determination for each of the identified victims.

Moreover, even if the Government were to now supplement the record to address these concerns, the Court would not be relieved of its obligation to review the dozens of victim objections – even those "accepted" by the Government – that have been filed. As it stands, the Court is in no position to sustain or overrule those objections without conducting evidentiary hearings, a lengthy and complicated process at best given the number of objections and the amounts at stake. *See* 18 U.S.C. § 3664(d)(4) (court "may require additional documentation or hear testimony" in setting restitution); 18 U.S.C. § 3771(a)(4) (crime victims enjoy "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing").

Although the Court would be ready, willing, and able to determine each victim's restitution award and resolve the outstanding objections if the record were to be supplemented as discussed above, Congress has signaled that the Court need not – and *should not* – undertake that task under the circumstances here. In enacting the MVRA, Congress made clear that district courts should not be saddled by complicated fact-finding with regard to victim loss when ordering restitution. Specifically, despite its name, the MVRA provides that restitution is *not* required

> if the court finds, from the facts on the record, that determining complex issues of fact

> related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B). This exception recognizes that restitution is "essentially a civil remedy created by Congress and incorporated into criminal proceedings *for reasons of economy and practicality*." *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (emphasis added). It reflects "Congress's intention that the process of determining an appropriate order of restitution be 'streamlined,' and that the restitution 'determination be made quickly.'" *United States v. Reifler*, 446 F.3d 65, 136 (2d Cir. 2006) (citations omitted). By including this exception in the MVRA, Congress "hoped to avoid creating a system that would, essentially, turn sentencing hearings into complicated, prolonged trials of the normal civil variety." *United States v. Gordon*, 393 F.3d 1044, 1060 (9th Cir. 2004) (Fernandez, J., concurring and dissenting). Simply put, "*Congress plainly intended that sentencing courts not become embroiled in intricate issues of proof*" related to restitution. *Reifler*, 446 F.3d at 136 (emphasis added); *see also United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996) (discussing similar provision in the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a); "[I]t was expected that entitlement to restitution could be readily determined by the sentencing judge based

upon the evidence he had heard during the trial of the criminal case.").[8]

This exception is particularly apt here. Determining the validity of the amounts claimed by each victim on the Government's final proposed restitution list, including the dozens who have objected to the Government's calculations, would take significant time and would be inherently complex, as the Government has twice conceded. Restitution has already been delayed for nearly two months post-sentencing, and the Court believes that it would take *at least* that long to marshal the necessary evidence, resolve all of the many pending objections, and determine the appropriate amount of restitution for each victim, including affording victims the opportunity to be heard. By statute, restitution orders are to be made within 90 days of sentencing, 18 U.S.C. § 3664(d)(5), and that is highly unlikely to occur here if the record is to be adequately supplemented.

Furthermore, even were the Court to wade into this thicket in an attempt to determine the appropriate amount of restitution for each victim, the end result would be meager. The Government has made clear that "restitution payments will represent only a small fraction of the total restitution order," since the

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[8] Because of the nearly identical language in the VWPA and the MVRA, courts often look to cases construing the former when interpreting the latter. *E.g.*, *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006).

assets available for restitution are estimated to be worth approximately $10-20 million (out of more than $2 billion in restitution sought). (Doc. No. 456 at 7.) In other words, restitution will, at best, result in the recovery of something less than a penny for each dollar of victim loss. In assessing whether to decline to order restitution due to complexity or undue delay, the court must evaluate "the need to provide restitution to any victim." 18 U.S.C. § 3663A(c)(3)(B). Here, the need for restitution is limited by its probable value, and the victims needing it most – unsophisticated individual investors who saw their life savings frittered away by the Defendant's fraud – likely would recover the smallest amounts, since the vast majority of losses were suffered by hedge funds and similar entities.

The Court also notes that alternative avenues of recovery are available to victims. The Government has previously suggested that, absent a restitution order, it would invoke its authority under Part 9 of Title 28 of the Code of Federal Regulations to remit forfeited assets – the same assets making up the pool of restitution funds – to victims. (*See* Doc. No. 393 at 3 n.1.)[9] In other words, through the remission process victims will have the opportunity to seek restitution from the same funds from which Court-ordered

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[9] Under the "remission" process, a crime victim may seek assets that have been forfeited by the Government as a result of a criminal offense in order to make up for the victim's loss. *See generally* 28 C.F.R. § 9.8.

restitution would be made. In addition, bankruptcy proceedings involving the Defendant's companies are currently pending, in which many of the victims have already asserted claims. The United States Trustee's Office "plans to assist all victims . . . in filing a bankruptcy claim (if a victim has not filed one already)." (Doc. No. 456 at 10 n.5.) And the funds available for distribution in the bankruptcy proceedings likely will far outpace those available here, since "clawbacks" and similar litigation are to take place there. (*See* Doc. No. 456 at 10 (noting that "there could be substantial distributions to the bankruptcy creditors through the bankruptcy proceedings").) Hence, victims have several means to recoup their losses other than restitution, before decision-makers better equipped to resolve their claims.[10]

At bottom, Section 3663A(c)(3)(B) calls for "a weighing of the burden of adjudicating the restitution issue against the desirability of *immediate* restitution – or, otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Kones*, 77 F.3d at 69. The burden imposed on the Court by ordering restitution here would be significant. At this juncture,

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[10] Indeed, it would be a waste of resources to order restitution of pennies on the dollar (at best) when most victims have filed, or will be filing, parallel claims in the bankruptcy proceedings.

the Court "simply does not have the factual record at its disposal to craft a restitution order without prolonging [the matter] for an intolerable period of time." *United States v. Collardeau*, No. Crim. 03-800, 2005 WL 1106475, at *8 (D.N.J. Apr. 28, 2005). On the other hand, the burden imposed on victims by declining restitution would not be overwhelming. While the Court is not unsympathetic to their plight, the victims have alternative avenues available to them, including one in which many victims have already asserted claims (bankruptcy). The amount of money at stake here, relative to their claims, is small. The benefits of a restitution order, therefore, would be minimal in the overall scheme of this case.

For these reasons, the Court concludes that, on balance, determining complex issues of fact related to the amount of the victims' losses would both complicate and prolong the sentencing process to such a degree that the need to provide restitution is outweighed by the burden it would impose. 18 U.S.C. § 3663A(c)(3)(B). Based on the foregoing, and all the files, records, and proceedings herein, the Court **DECLINES** to order restitution. Instead, the Government may proceed through the remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9. The restitution hearing currently scheduled for June 9, 2010, is **CANCELED**. The Government is **DIRECTED** to forward a copy of this Order to each

victim identified on its final proposed restitution order.[11]

Dated: June 3, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

[11] Shortly before the Court issued this Order, the Defendant filed a position statement (Doc. No. 458) advocating for the same result reached here: no restitution. Nevertheless, the Court bases its decision on the complexity and length of the restitution process, not on the Defendant's arguments.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

v. **ORDER**

Robert Dean White,

Defendant, Crim. No. 08-299 (RHK)

Michael Catain,

Defendant, Crim. No. 08-302 (RHK)

Deanna Lynn Coleman,

Defendant, Crim. No. 08-304 (RHK)

Larry Reynolds,

Defendant. Crim. No. 08-320 (RHK)

The Defendant in each of these cases has pleaded guilty in connection with a fraud scheme for which Thomas Joseph Petters was convicted by jury of 20 counts of wire fraud, mail fraud, money laundering, and conspiracy (Crim. No. 08-364). By Order dated June 3, 2010 (Doc. No. 459), the Court declined to order restitution in the Petters matter. In the Court's view, the reasons for declining a restitution order in Petters are equally applicable with respect to these Defendants. Accordingly, for the reasons stated in the Court's June 3, 2010 Order in Petters, which are expressly adopted herein by reference, the Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the

remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9.

Dated: June 4, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

v. **ORDER**

Harold Katz,

Defendant, Crim. No. 09-243 (RHK)

Gregory Bell,

Defendant, Crim. No. 09-269 (RHK)

The Defendant in each of these cases has pleaded guilty in connection with a fraud scheme for which Thomas Joseph Petters was convicted by jury of 20 counts of wire fraud, mail fraud, money laundering, and conspiracy (Crim. No. 08-364). By Order dated June 3, 2010 (Doc. No. 459 in Crim. No. 08-364), the Court declined to order restitution in the Petters matter, concluding that "determining complex issues of fact related to the amount of the victims' losses would both complicate and prolong the sentencing process to such a degree that the need to provide restitution is outweighed by the burden it would impose." (Id. at 10-11 (citing 18 U.S.C. § 3663A(c)(3)(B)).) The Court later issued a similar Order declining to order restitution by Robert White, Michael Catain, Larry Reynolds, and Deanna Coleman, each of whom participated in the Petters fraud and pleaded guilty in connection therewith.

The Court has now been informed by the Probation Officer that the list of victims of the crimes for which Defendants Katz and Bell have pleaded guilty overlaps in substantial measure, although not entirely, with that in Petters. Moreover, the Court is informed that there have been more than three dozen objections to the Probation Officer's calculations of the appropriate restitution amounts. While resolving those objections would not require as Herculean an effort as that presented by the 100+ objections in Petters, the Court believes that the same problems endemic to restitution in that case are evident here. Simply put, although the universe of victims and objections is smaller, the reasons for declining a restitution order in Petters are equally applicable with respect to these Defendants.

Accordingly, for the reasons stated in the Court's June 3, 2010 Order in Petters and in its June 4, 2010 Order in White, Catain, Reynolds, and Coleman, which are expressly adopted herein by reference, the Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9.

Dated: July 2, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	File No. 08 CR 304 (RHK)
Plaintiff,	Saint Paul, Minnesota
vs.	September 2, 2010
DEANNA LYNN COLEMAN,	9:30 a.m.
Defendant.	

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(SENTENCE HEARING)

APPEARANCES

For the Plaintiff: UNITED STATES ATTORNEY
JOSEPH T. DIXON, AUSA
TIMOTHY RANK, AUSA
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For the Defendant: CAPLAN LAW FIRM, PA
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Saint Paul, Minnesota 55101

PROCEEDINGS

IN OPEN COURT

THE COURT: Before we get underway, let me just remind those of you who are in attendance here today that we do not allow cell phones or other recording devices in the courtroom; and if anybody does have a cell phone, please make sure that it is off so that we don't have an interruption during the course of these proceedings.

We're here on United States of America versus Deanna Lynn Coleman, criminal file number 08-304. Let's start with the appearances for the United States.

MR. DIXON: Joe Dixon and Tim Rank for the United States. Good morning, your Honor.

THE COURT: Good morning, counsel. And for the Defendant.

MR. CAPLAN: Alan Caplan, your Honor, representing Ms. Coleman.

THE COURT: And Ms. Coleman is also present.

MR. CAPLAN: She is, your Honor.

THE COURT: Good morning to both of you. We are here for imposition of sentence, the Defendant having been previously – why don't you be seated, Counsel – the Defendant having previously entered a plea of guilty on October 8th of 2008 to a one-count

information charging her with conspiracy to commit mail fraud in violation of Title 18, United States Code, Section 371. And the presentence investigation report has been completed and so we're now here for sentencing. I think I would like to start by finding out from Counsel, particularly Mr. Dixon, what you have heard with respect to any victims who wish to be heard here this morning.

MR. DIXON: My understanding is that representatives of Ritchie Lenders, there's a variety of Ritchie Lenders –

THE COURT: Right.

MR. DIXON: – are here. They are right here. Tom Cronin from Illinois is here.

MR. CRONIN: Good morning, your Honor.

THE COURT: Good morning, Mr. Cronin.

MR. DIXON: And I'm not aware of any other victims that wish to be heard this morning. Obviously, as the Court knows, we support any right and wish of the victims to be heard subject to the Court fashioning procedures.

THE COURT: Would you like to be heard now or do you want to wait until we get into the middle of the proceedings? What's your pleasure?

MR. CRONIN: Whatever the Court's pleasure.

THE COURT: Why don't we start with you.

MR. CRONIN: Thank you, your Honor. Thomas Cronin, Gary Vale (phonetically spelled) and Jennifer Wilson on behalf of, as Mr. Dixon said, Ritchie Capital Management.

THE COURT: That podium, if it is better for you, goes up a little bit.

MR. DIXON: He is a little taller than I am, Judge.

THE COURT: We'll bring it back for you, Mr. Dixon.

MR. DIXON: Thank you.

MR. CRONIN: Thank you. On behalf of Ritchie Capital Management, a fund manager and related entities, the names of the entities we represent are set forth in a motion pursuant to the Crime Victims Act that I understand has now been filed today, so I won't repeat or belabor the arguments made there but I wanted to make a few points.

THE COURT: Let me make sure, there was a motion – it seems that I saw a couple of motions by Ritchie. One to be heard and another one to either revisit or vacate the restitution order. Something to that effect. Which are we going to talk about here today?

MR. CRONIN: We're going to talk about the motion pursuant to the Crime Victims Act to vacate the restitution orders, your Honor. We feel we've never –

THE COURT: Wait, wait, wait. The restitution order was entered. You people objected to it. You asked me to vacate, as I recall, at that time. I denied it. You filed a writ of mandamus with the Eighth Circuit, and they turned you down. I'm not going to revisit that issue. As far as I'm concerned, the restitution issue is behind us.

MR. CRONIN: Your Honor, most respectfully, we think we have a right to be heard on that. Procedurally that we've never had a chance to do it. Restitution under the act –

THE COURT: Why didn't you do it after the order was issued instead of going to the Eighth Circuit right away?

MR. CRONIN: We did file a motion to try to vacate it.

THE COURT: What did I do to it?

MR. CRONIN: I don't think it was ever ruled upon, your Honor.

THE COURT: I'll deny it now then if you want me to nunc pro tunc. I'm not going to listen to you with respect to the restitution. You can talk about you're here, you're representing the victims. You can talk about your view as to what the victims – how that might impact the sentence in this case, and that's the only issue that I'm going to hear from. So if that's all you have to say, then I think you're going to have a very short appearance here today.

MR. CRONIN: Well, your Honor, if I may, let me talk about the flipside then, the procedure and forfeiture that brings us here today. I mean, basically we think that – and I won't use the word restitution, but we think that we have a right to be heard on the fact of the Defendant's obligations to repay victims what's been lost here. We're not here to address really the Defendant's request for leniency on jail time or the Government's position on that either.

THE COURT: Then you're not going to be heard this morning.

MR. CRONIN: Your Honor, frankly, most respectfully I would ask the Court's indulgence simply to make a record. We think that this is a very important issue for victims. Ritchie Capital Management – the evidence used in the trial that the Defendant Coleman testified to shows that Ritchie was involved and lost up to 200 million dollars.

THE COURT: I don't think there is any doubt that Ritchie lost the money. That's not the issue. That's not in doubt, I don't think. Ritchie lost money and so did a lot of people that invested with Ritchie lost money.

MR. CRONIN: Yes, your Honor.

THE COURT: We're not going to visit that issue. If you want to talk about sentencing as a victim and the impact of what happened here might have on the sentencing I'll hear you. But I'm not going to go back and talk about the restitution issue or forfeiture

issue. Those are behind us. If you want to file something with the Court afterwards and make your record you can do it that way. But we're not going to take up my time and the time of everybody here in the audience.

MR. CRONIN: Your Honor, can I confirm that our motion to vacate your order has been filed?

THE COURT: I have been told that it's been filed.

MR. DIXON: Your Honor, I think it's in the process right now. It will be filed this morning with the clerk of the court in the court file.

THE COURT: So it will be filed.

MR. CRONIN: Your Honor, if I can ask the Court's indulgence, can I make a very brief point?

THE COURT: I don't think you are capable of making a very brief point. That's not the impression I have. I'm not going to get into that issue, and I don't know how I can make it any clearer except to say no.

MR. CRONIN: Your Honor, I –

THE COURT: You respectfully disagree.

MR. CRONIN: I respectfully disagree. I think the Crime Victims Act, Mandatory Restitution Act allows us to have an opportunity to –

THE COURT: The restitution issue, I said I decline to issue a restitution order. I sent the matter out to Washington. You can go out to Washington and argue about it, you can talk to the Bankruptcy Court about it, but it's out of my hands at this stage. You tried to get it back in and you went to the Eighth Circuit and they said no.

MR. CRONIN: We've never been heard on it, your Honor. We've never had an opportunity to address the Court on this point and that's what the Crime Victims Act permits us to do.

THE COURT: Well, I'm not going to let you do it. Okay. Any other victims you're aware of, Mr. Dixon?

Anybody else here in the audience who considers themselves a victim?

MR. DIXON: Your Honor, I don't see any victims and I think we can move forward.

* * *

Statutes

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16 [18 USCS § 16];

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 [18 USCS § 1365] (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664 [18 USCS § 3664].

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18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate

report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter [18 USCS §§ 3661 et seq.], chapter 227 [18 USCS §§ 3551 et seq.], and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

(A) provide notice to all identified victims of –

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for

the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572 [18 USCS § 3572], specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of –

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title [18 USCS §§ 3571 et seq. and 3611 et seq.]; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 [18 USCS § 3742] of chapter 235 of this title;

(B) appealed and modified under section 3742 [18 USCS § 3742];

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A [18 USCS § 3664(k), 3572, or 3613A]; or

(2) the defendant may be resentenced under section 3565 or 3614 [18 USCS § 3565 or 3614].

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A [18 USCS §§ 2248, 2259, 2264, 2327, 3663, and 3663A] and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

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§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that

testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.

(1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.

(A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.

(i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.

(1) Government. Officers and employees of the Department of Justice and other departments and

agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.

(1) Rights. The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in

the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if –

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section], the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall –

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be

no judicial review of the final decision of the Attorney General by a complainant.

180 (2)

SUPREME COURT U.S.
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No. 10-738

In the Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., *et al.*,
Petitioners,

v.

THOMAS PETTERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THOMAS PETTERS

Jon M. Hopeman
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QUESTIONS PRESENTED

1. Whether the Mandatory Victims Restitution Act (MVRA) "complexity exception" permits a district court to decline an order of restitution where the victims number in the hundreds and each claim would require a separate hearing to resolve highly-complex issues regarding loss.

2. Whether the Crime Victims' Rights Act (CVRA) "written opinion" mandate is waived by the complainant's failure to preserve the issue below and by failure to employ the appropriate procedural vehicle in seeking review of the matter.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Thomas Petters opposes the Petition for Writ of Certiorari submitted by the conglomerate of hedge funds known as Ritchie Special Credit Investments, Ltd., *et al.* ("Ritchie Entities").

STATEMENT OF THE CASE

I. The PCI fraud

Following a cooperating witness's proffer to federal law enforcement officials, including the United States Attorney's Office for the District of Minnesota ("Government"), a fraudulent scheme was uncovered at the Minnesota company known as Petters Company, Inc. ("PCI"). Briefly stated, PCI would borrow money from certain investment entities (*e.g.*, hedge funds), asserting that the loan funds would be used to purchase consumer goods for resale to retailers. In reality, though, PCI was not purchasing consumer goods with the loan funds, but rather was using the funds for other purposes and to pay off prior lenders—a Ponzi scheme.

PCI would funnel a portion of the profits from the scheme to Petters Group Worldwide ("PGW"), a Minnesota umbrella company controlling many legitimate companies. PGW, in turn, would distribute PCI's illicit profits to its subsidiaries.

The Government's above-mentioned principal cooperator, Deanna Coleman, pled guilty to her role in the scheme. Over time, additional individuals also

pled guilty and began cooperating with the Government: Robert White; Michael Catain; Larry Reynolds; Greg Bell; and Harold Katz.

II. The legal actions

Parallel criminal and civil actions ensued: (a) criminal actions brought by the Government against Mr. Petters and others; (b) a civil action brought by the Government against Mr. Petters and others, freezing the assets of said individuals and imposing a receivership ("Receivership Action"); and (c) a number of bankruptcy actions, wherein PCI, PGW, and a number of PGW-controlled entities filed for bankruptcy protection ("Bankruptcy Actions").

III. Order with respect to restitution

Mr. Petters pled not guilty and defended against the Government's criminal charges at trial. He did not defend on the basis that there was no fraudulent scheme—for their was one. Rather, his defense was that his trusted lieutenants concocted and ran the scheme without Mr. Petters' knowledge. A jury found Mr. Petters guilty, though the conviction is currently being reviewed on appeal, *United States v. Thomas Joseph Petters*, No. 10-1843 (8th Cir.).

After the jury returned its verdict, the district court delayed entry of a restitution order. The Government conducted an extensive restitution investigation and analysis, ultimately identifying 475 victims of the PCI fraud.

In its final proposed restitution order the Government acknowledged that, based upon the funds available at the time, each victim would receive perhaps one cent on the dollar in restitution. The Government also noted that additional funds might later be available through the remission process relating to criminal forfeiture, and/or the pending Bankruptcy Actions.

The Ritchie Entities objected to the Government's proposed restitution order, claiming that only direct investors were victims within the meaning of the federal restitution regime. The Government countered that this cramped view of what constitutes a victim did not conform to the law, and would have the perverse result of cutting the most vulnerable victims (*e.g.*, elderly individual investors) out of the restitution calculus. Mr. Petters took the position that no restitution order ought to be made because victims would receive perhaps a penny on the dollar, and such an order would only complicate the process in the Receivership Action and Bankruptcy Actions for victims to be compensated as fully and fairly as possible.

Ultimately, the district court issued an order denying restitution based on the MVRA's "complexity exception." Pet. App. at 6-22.

IV. Coordination agreement

Subsequently, the Government, Receiver, and Bankruptcy Trustees entered into a coordination agreement, approved by the district courts in the Receivership Action and Bankruptcy Actions.

The coordination agreement notes: "[T]here is a significant overlap between victims of the fraud and creditors of the PCI Estates and PGW Estate, and competing litigation would result in overall diminishment of recovery for victims and creditors alike and undue delay in the distribution of assets." It was agreed that, as to individual defendants in the criminal actions, the Government will use its statutory authority to forfeit assets for eventual return to victims through the Department of Justice administrative remission process. The Receiver and Bankruptcy Trustees will pursue civil clawback actions, and funds from these actions will either go to the bankruptcy estates or the Government for payment to victims via the remission process.

ARGUMENT

Candidly speaking, this Court's decision with respect to the Ritchie Entities' Petition matters little to Mr. Petters. He has disputed and continues to dispute his conviction and sentence, not the district court's restitution order. Having said that, a major fraud occurred here and many victims were harmed. Mr. Petters wishes to do what he can to assist the most victims in the fairest way possible, which is why he takes the following position:

I. The Petition must be denied because the District Court correctly stated the clear and unanimously-held law with respect to the MVRA's "complexity exception"; The Ritchie Entities' quarrel is with District Court's factual findings, which is not a rationale for certiorari review.

A. Standard for certiorari review

Review on a writ of certiorari is discretionary and only to be granted for "compelling" reasons, such as a circuit split with respect to an important legal question. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. SUP. CT. RULE 10.

The Ritchie Entities assert that there is some legal question as to how the MVRA's "complexity exception", 18 U.S.C. § 3663A(c)(3)(B), is applied. In truth, though, the statute is plain on its face, there is no disagreement among the circuits as to its

application, and the district court properly followed its plain language in denying restitution here.

B. Unambiguous statutory language

The principal issue raised by the Ritchie Entities is whether a sentencing court may invoke the MVRA's complexity exception to "deny restitution to the victims." Pet. at 8-10. The plain language of the statute provides that the answer is yes. The MVRA compels district courts to order restitution in cases involving violence, property, and consumer protection. But the statute also makes an explicit "complexity exception":

> This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) [property and fraud offenses] if the court finds, from facts on the record, that . . . determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B).

C. Application of law to facts

The Ritchie Entities do not seriously dispute the clarity of the statutory language, nor do they cite contrary authority. They do not even dispute that the district court went through an extensive list of reasons why the complexity exception should apply: (i) there were a large number of victims; (ii) the list

of victims and claimed damages continually changed without obvious explanation or documentation; (iii) the restitution process would require literally hundreds of evidentiary hearings, a process that would delay final resolution of the matter; and (iv) even if the district court were to engage in the process, it would result in perhaps a penny on the dollar per victim.

D. Absence of circuit split

The Ritchie Entities complain that the district court improperly considered the existence of alternative remedies in invoking the complexity exception. First, they incorrectly suggest that the district court heavily relied on the existence of alternative remedies. As noted above, the district court merely mentioned the availability of alternative remedies in passing, probably to make clear that it was not leaving victims unprotected. It was not a major consideration in the district court's reasoning.

But even if the district court partially relied on the existence of alternative remedies, courts have permitted a district court to consider this as a factor in determining whether the complexity exception should apply. *United States v. Gallant*, 537 F.3d 1202, 1254 (10th Cir. 2008).

The Ritchie Entities wrongly state that there is a circuit split as to whether it is appropriate to consider alternative remedies, though the proposition does not withstand scrutiny.

They principally rely on *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006). But *Cienfuegos* is a manslaughter case—a crime of violence for which the complexity exception plainly does not apply. The Ninth Circuit said as much. *Id.* at 1168.

Next, the Ritchie Entities cite *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000). This is not a complexity exception case either, nor is the applicable statutory provision cited therein. Rather, *Alalade* stands for the unremarkable proposition that the district court is generally required to order the full amount of restitution even where the Government has forfeited certain property that will may be available for restitution at some future time.

Last, the Ritchie Entities cite *United States v. Hyde*, 497 F.3d 103 (1st Cir. 2007), which again has nothing to do with the complexity exception. Rather, that case simply affirms the district court's authority to enforce its restitution order through a writ of garnishment.

Put simply, the district court did not rely heavily on existence of alternative remedies. But even if it had done so, the law states that it is a permissible factor and there is no disagreement among the circuits on the point.

E. Impropriety of certiorari review

In sum, the Ritchie Entities cannot point to any legal question worthy of this Court's certiorari review. Their real complaint is one of application of clearly-established law to facts in this particular

case—a situation where certiorari review is rarely appropriate. U.S. SUP. CT. RULE 10. This Court grants certiorari review to resolve federal questions of importance to the public, not to add an extra layer of review to matters of interest only to individual litigants. *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1955).

Moreover, the Ritchie Entities' true goal is apparent—they discern some strategic advantage in a restitution order that places them in a superior position *vis-à-vis* other victims. This is hardly a compelling rationale for this Court's discretionary review. It is telling that the Government has not appealed the district court's order regarding restitution, though it could have done so. This Court should not grant discretionary review here.

II. The Petition must be denied with respect to the CVRA's "written opinion" provision because the Ritchie Entities waived the issue for failure to raise it before the Court of Appeals, and moreover there is nothing in the record indicating the result would be different if a written opinion were to issue.

A. Failure to preserve issue

The CVRA gives crime victims the authority to petition a district court to enforce statutory rights. "If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

The Ritchie Entities now claim the Eighth Circuit violated this "written opinion" provision. But they never made the argument to the Eighth Circuit Court of Appeals, precluding this Court's review. *Glover v. United States*, 531 U.S. 198, 205 (2001).

Notably, the written opinion matter appears nowhere in the Ritchie Entities' list of issues submitted to the Eighth Circuit, *In re Ritchie Special Credit Investments, Ltd.*, No. 10-3050 (8th Cir.) (Pet. for Mandamus, Docket No. 3703994 at 3-4), effectively abandoning the matter, *Anderson Marketing, Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (8th Cir. 1995). Nor did they submit a petition for panel rehearing or rehearing *en banc* after the Eighth Circuit issued its opinion. FRAP 35, 40. The

issue was simply not raised, and this Court does not grant certiorari review where the claimed error is not preserved below. *Glover*, 531 U.S. at 205.

The Ritchie Entities may rely on a handful of references to the written opinion rule in their Petition for Mandamus. But passing references do not suffice to raise or preserve an issue. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991). The rules properly place the burden on an appealing party to set out clear issues for the Court of Appeals to decide. FRAP 28(a)(5), (9). Were it otherwise, appellants would propound ever-shifting theories in seeking this Court's review.

In short, the issue has not been preserved. Certiorari review would be an exercise in futility.

B. Improper appeal procedure

The Ritchie Entities seek to compel a lower court to perform a claimed mandatory duty—an action that requires a petitioner to proceed by extraordinary writ rather than petition for certiorari review. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978); *see also* U.S. SUP. CT. RULE 20. Thus, the Petition for Certiorari at issue here is not the appropriate vehicle by which to raise the "written opinion" issue.

Moreover, the Ritchie Entities' failure to raise the issue before the Court of Appeals would foreclose a petition for extraordinary writ in the same way that it forecloses the Petition at issue here. *In re Blodgett*, 502 U.S. 236, 240 (1992).

C. Impropriety of certiorari review

Even ignoring the fatal procedural defects, there is no need for this Court to wade into the issue, certainly not in this case.

First, the statute is clear on its face, so there exists no important point of federal law to consider, nor a conflict in the law to resolve.

Second, the district court issued a lengthy, well-reasoned opinion. The Ritchie Entities then briefed a lengthy Petition for Mandamus to the Eighth Circuit, clearly setting out their arguments which were ultimately rejected. Thus, all sides of the argument have been laid out. There is no reason to suppose a "written opinion" by the Court of Appeals would alter the result in any way.

Last, the Eighth Circuit no doubt would have issued a written opinion had the matter been brought to Court of Appeals' attention more explicitly. It was not, and now the Ritchie Entities improperly seek to use unpreserved error as a wedge into this Court.

Based on all these fatal deficiencies, the Ritchie Entities' Petition must be denied.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari must be denied.

Respectfully submitted,

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April 13, 2011

No. 10-738

IN THE

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GREGORY M. BELL

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STATEMENT OF THE CASE

Petitioners Ritchie Special Credit Investments, Ltd., *et al.* claim that the United States District Court for the District of Minnesota erred by not awarding them restitution under the Mandatory Victims Restitution Act ("MVRA") and the Crime Victim Rights Act ("CVRA") for losses that they allegedly suffered as purported victims of the fraud to which respondent Gregory Bell pleaded guilty. Specifically, Petitioners contend that it was improper for the district court to consider the availability of alternative remedies in determining whether to award restitution under the MVRA. However, Petitioners never raised this argument in the district court. Moreover, even if Petitioners had done so, they would have had no standing because they were not victims of Bell's crime.

Wholly apart from these procedural obstacles, this case presents no compelling issue for the Court's review. In fact, there is no true split of authority between the circuits over the issue of whether it is appropriate to consider the availability of alternate remedies in determining not to award restitution under the MVRA and the CVRA on the ground of complexity. Moreover, the district court properly applied the law when it imposed a sentence on Bell without restitution and the Eighth Circuit's denial of Petitioners' mandamus petition was correct.

Respondent Gregory Bell pleaded guilty on October 7, 2009 to a one-count information charging him with wire fraud, in violation of Title 18, United States Code, Section 1343, because of material omissions and misrepresentations he made to investors in his hedge funds about those funds' investments in promissory notes

("PCI Notes") issued by Petters Company, Incorporated ("PCI"). (Bell Inf. at 1, Bell Dkt. #40.) The fraud to which Bell pleaded guilty was separate from (albeit related to) the massive Ponzi scheme that respondent Thomas Petters perpetrated. (U.S. Sent. Pos. Paper at 6, Bell Dkt. #58 ("Bell was not part of the underlying Petters fraud.")) Petters and respondents Deanna Lynn Coleman, Robert Dean White, Michael Catain and Larry Reynolds were charged in separate instruments with crimes arising out of their participation in that scheme. Petters was convicted after trial and the other respondents pleaded guilty; each was sentenced separately. (Petters Verdict, Petters Dkt. # 361; Plea Hrng. Mins. for Coleman (Dkt. #3), White (Dkt. #4), Catain (Dkt., #3) and Reynolds (Dkt., #4).) As a result, Bell was not a "co-defendant" of Petters or any other of the Petters co-conspirators, as Petitioners assert.[1]

Through a series of affiliates, Bell owned and controlled a management fund which advised, and was the general partner of, three hedge funds: Lancelot Investors Fund, LP, Lancelot Investors Fund II, LP and Lancelot Investors Fund, Ltd. (collectively, "Lancelot"). (Bell Sent. Pos. Paper at 1, Bell Dkt. #57; Bell Dkt. #58 at 1.) Bell's crime was raising money for Lancelot between February and September 2008 from investors while deceiving those investors about the fact that the primary investment into which such money would be placed—PCI Notes—was woefully delinquent. (Bell Dkt. #58 at 3 & 6-7.) In fact, Petters had been conducting a massive Ponzi scheme

1. Respondent Katz pleaded guilty to a charge of conspiracy to commit wire fraud in connection with the Bell fraud. (Katz Plea Hrng Mins, Katz Dkt. #9; Transcr. of Katz Sent. Hrng. at 2, Katz Dkt. #32.)

for at least 13 years and, as a result, the PCI notes were worthless. (Bell Dkt. #57 at 1; Bell Dkt. #58 at 1.)

Although Bell did not learn that PCI was a house of cards until Petters' arrest on September 24, 2008, Bell did know, in late 2007, that PCI had started to become delinquent in making payments on its notes. (Bell Dkt. #57 at 1.) Bell did not disclose these late payments to Lancelot's investors, but instead executed an extension agreement with PCI that extended the repayment terms of all PCI Notes from 180 to 270 days. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2.) Bell did not disclose this extension agreement to Lancelot investors unless specifically asked and, even then, he did not reveal the fact that the extension was prompted by PCI's delinquencies. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2-3.)

The 90-day extension only delayed PCI's payment problems and, by February 2008, the PCI Notes were again delinquent. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2.) Bell did not disclose these delinquencies, either, but, rather, engineered "round-trip" transactions that gave investors and potential investors the false impression that PCI was paying its notes in a timely manner. (Bell Dkt. #57 at 2.) Accordingly, Mr. Bell's crime was taking "in more than two hundred million dollars [into Lancelot] in new investor money [between February and September 2008] without telling any of the new investors that there were any problems with the PCI [N]otes." (Bell Dkt. #58 at 3.) This crime amounted to a "separate and independent" fraud from that committed by Petters and his associates. (Bell Dkt. #58 at 6.)

Petitioners assert that they are victims under the MVRA and the CVRA, and entitled to restitution, because they were defrauded into loaning $189 million to Petters, most of which was lost when Petters' Ponzi scheme collapsed. (Pet. for Cert. at 2-3.) As a result of this loss, Petitioners may have a basis to claim that they were victims of Petters and the other respondents who pleaded guilty to participating in Petters' fraud; however, they were not victims of Bell's separate fraud. To the contrary, Petitioners invested in Lancelot between 2002 and 2005, well before the February 2008 to September 2008 fraud to which Bell pleaded guilty. (Mandamus Pet. at 3-4 & n. 1.)

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

This Court should deny the writ entirely for the reasons stated in the brief of respondent Petters, which we incorporate by reference. However, regardless of the disposition of the writ as to the other respondents, there are two additional reasons for denying the writ in *Bell*. ***First***, Petitioners did not preserve their claims of error in *Bell*, as they failed to assert their arguments in the district court. ***Second***, Petitioners lack standing to seek the relief they request (restitution from Bell) because they are not victims of Bell's crime.

I. Petitioners Forfeited Their Claims Of Error By Not Asserting Their Arguments In The District Court.

Petitioners never objected to the district court's consideration of alternative remedies in considering whether to decline to award restitution pursuant to the MVRA's complexity exception. As a result, their claims

of error as to *Bell* are unpreserved. *See* Fed. R. Crim. Pr. 51(b).

The district court issued a brief opinion on July 2, 2010 announcing its intent not to order restitution when it imposed sentence on Bell and respondent Katz. (July 2, 2010 Order, Bell Dkt. #47.) That order, however, was issued almost three months before the district court sentenced Bell on September 30, 2010, (See Bell Dkt.) and Petitioners had ample opportunity to present their objections. Indeed, Petitioners subsequently filed a motion to vacate that order.[2] (Mot. to Vacate, Coleman Dkt. #34.) That motion presented a number of reasons why the court should vacate its order and award restitution but did not present the argument set forth in the question presented, *i.e.*, that the MVRA prevents a court from considering the ability of victims to recoup losses in alternative forums in determining whether to decline to order restitution under the MVRA's complexity exception.[3] (Coleman Dkt. #34.) The District Court also provided an opportunity for any victims to be heard in person at Bell's sentencing hearing; however, Petitioners did not even appear at sentencing much less present the argument that they now ask this Court to consider. (Bell Sent. Hrng Transcr. at 1-3, Bell Dkt. #70.)

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2. The motion was captioned with the docket numbers of six different cases, including Bell's, but was docketed only in *United States v. Coleman*, 08-cr-00304. (Coleman Dkt. #34.)

3. Petitioners suggest that they were prevented from fully developing their record in the district court. (Pet. for Cert. at 7, note 2.) However, if Petitioners believed the record was incomplete, they should have sought to correct or modify it, pursuant to Fed. R. App. Pro. 10(e).

Under the circumstances, Petitioners had no right to seek mandamus relief from the Eighth Circuit, much less a compelling basis for discretionary review by this Court. In particular, Federal Rule of Criminal Procedure 51(b) provides: "A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Here, despite having almost three months in which to do so, Petitioners never once set forth "the grounds for that objection," as the Rule requires. Accordingly, this claim of error is unpreserved. *Cf. Henderson v. Kibbe*, 431 U.S. 145, 154 n. 12 (1977) ("orderly procedure" requires an objection, so that an issue may be addressed).

II. Petitioners Were Not "Victims" Of Bell's Fraud And Therefore Lack Standing.

The MVRA defines a "victim" as any "person directly and proximately harmed as a result of the commission of an offense . . . including, in the case of an offense that involves as an element a scheme, . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme . . . ." 18 U.S.C.A. § 3663A(a)(2). The definition in the CVRA is nearly identical. *See United States v. Speakman*, 594 F.3d 1165, 1171 n. 3 (10th Cir. 2010). Under these definitions, petitioners were not in fact victims of Bell's crime. (Bell Dkt. #58 at 6.) Indeed, the Petition itself does not even articulate any harm that Petitioners purportedly suffered that was proximately caused by Bell's scheme.

To the contrary, the Petition merely asserts that "Petters and his co-conspirators bilked their victims by borrowing huge sums evidenced by promissory notes," Petition at 2; "[b]etween February and May, 2008, . . . petitioners loaned a total of $189 million to Petters and his companies in a series of [fraudulent] short-term notes," *id.* at 3; and, when Petters' Ponzi scheme collapsed, "Petters and his companies owed [Petitioners] more than $165 million." *Id.* There is no mention of Bell and with good reason: Bell was not charged with participating in Petters' Ponzi scheme. Bell's crime was much narrower; he was charged with defrauding Lancelot investors over a discrete period of time – February 2008 to September 2008 – by deceiving them about the performance of Lancelot's investments in PCI notes. Thus, only those who invested in Lancelot during that time period are victims of Bell's crime. As Petitioners themselves admitted in their original "Motion Pursuant to 18 U.S.C. 3771(A)(4) and Fed. R. Crim. P. 31(I)(4)(B) & 60(A)(3) to be Heard at the Sentencings of Defendants" in the district court, "Affiliates of the Lancelot Investors made investments in the Lancelot Funds between 2002 and 2005 and subsequently transferred those investments to the Lancelot Investors *prior to 2008*." (Mot. to be Heard at 8, Coleman Dkt. #33 (emphasis added).) Because those investments were admittedly completed years before Bell's scheme even began, Petitioners cannot be victims of Bell's crime.[4] Accordingly, Petitioners have no claim for

4. Petitioners may indeed have lost money as a result of their early investments in Lancelot, but any such losses would have been a result of Bell's and Lancelot's mistaken (but not criminal) decision to invest Lancelot funds in PCI Notes, which turned out to be virtually worthless. Those early, bad investment decisions, however, are not part of Bell's fraud because there is no allegation

restitution and lack standing under the MVRA. 18 U.S.C. § 3771(d)(1) ("the crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).")

CONCLUSION

For the reasons stated above and in the opposition of respondent Petters, the writ of certiorari should be denied.

Respectfully Submitted,

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Dated: April 13, 2011

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in the information to which Bell pleaded guilty that Bell knew the PCI Notes were worthless at that time. (Bell Dkt. #40.)

187 (4)

No. 10-738

In the Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred by denying restitution to the victims of a large, multi-billion-dollar fraud scheme under the complexity exception to mandatory restitution under 18 U.S.C. 3663A(c)(3)(B), based in part on the availability of other sources of recovery.

2. Whether the court of appeals erred by failing to "clearly state[] on the record in a written opinion," 18 U.S.C. 3771(d)(3), its reasons for denying petitioners' mandamus petitions.

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In the Supreme Court of the United States

No. 10-738

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgments of the court of appeals (Pet. App. 1-2, 3-5) are unreported. The orders of the district court (Pet. App. 6-18, 19-20, 21-22) are not published but the order in the lead case (Pet. App. 6-18) is available at 2010 WL 2291486.

JURISDICTION

The judgments of the court of appeals were entered on August 3, 2010, and September 24, 2010. On October 21, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari from the August 3 judgment to and including December 1, 2010. The petition for a writ of certiorari was filed on December 1,

2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek this Court's review of judgments arising from seven related but separate federal prosecutions in the United States District Court for the District of Minnesota. In the lead case, Thomas Petters was convicted after a jury trial on 20 counts of wire and mail fraud, money laundering, and conspiracy in connection with a massive, multi-billion-dollar Ponzi scheme that he orchestrated. Six of his associates (co-defendants) were convicted in six separate cases after pleading guilty to various offenses in connection with that scheme. Petitioners are investment funds and a fund manager who were victims of the fraudulent scheme. In each of the seven prosecutions, the district court declined to order restitution for any of the defendants' putative victims under the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 206(a), 110 Stat. 1232 (18 U.S.C. 3663A). See Pet. App. 6-18, 19-20, 21-22. The court of appeals denied mandamus relief. *Id.* at 1-2, 3-5.

1. Petters was a well-known Minneapolis businessman who owned numerous businesses, including the Polaroid Corporation; Sun Country Airlines; Petters Group Worldwide LLC; and Petters Company, Inc. (PCI). Gov't C.A. Br. at 22, *United States* v. *Petters*, No. 10-1843 (8th Cir.) (Gov't *Petters* Br.). In the late 1980s, Petters began orchestrating a massive Ponzi scheme by borrowing large amounts of money from banks and investors to leverage other transactions. *Id.* at 22-27. Between February and May 2008, while the Nation was experiencing an economic downturn and credit crisis, petitioners loaned roughly $189 million to Petters and

his companies in a series of short-term promissory notes supported by security interests in business assets. Pet. 3; see *United States* v. *Ritchie Special Credit Invs. Ltd.*, 620 F.3d 824, 827-828 (8th Cir. 2010) (*Ritchie I*) (noting that the security interests were challenged in bankruptcy proceedings).

In September 2008, Deanna Coleman, a PCI employee, informed the Department of Justice that she had been assisting Petters in a multi-billion-dollar fraud for more than ten years. Gov't *Petters* Br. 1, 22-23. The government subsequently initiated civil and criminal actions against Petters, his businesses, and several of his associates. In October 2008, the government commenced a civil, anti-fraud action for injunctive relief in which it obtained court orders (1) freezing Petters's and his co-defendants' assets; (2) placing the assets in receivership; (3) appointing a receiver to protect the assets; and (4) staying all civil litigation by creditors, victims, and others against Petters or his companies. See *id.* at 4; *Ritchie I*, 620 F.3d at 828; *Ritchie Special Credit Invs., Ltd.* v. *United States Trustee*, 620 F.3d 847, 850-851 (8th Cir. 2010). The receiver then initiated Chapter 11 bankruptcy proceedings for at least ten of the business entities associated with Petters. See *id.* at 851 & n.5.

2. The government brought separate criminal prosecutions in the District of Minnesota against Petters (No. 08-cr-364) and, as relevant here, six of his associates: Robert White (No. 08-cr-299), Michael Catain (No. 08-cr-302), Deanna Coleman (No. 08-cr-304), Larry Reynolds (No. 08-cr-320), Harold Katz (No. 09-cr-243), and Gregory Bell (No. 09-cr-269). The district court in each of those seven, separate cases declined to order the defendants to pay restitution. Pet. App. 6, 19, 21.

The MVRA generally requires—with a statutory exception discussed below—that the district court "order * * * that the defendant make restitution to the victim" if the defendant is convicted of a qualifying federal offense, including "any [property] offense committed by fraud or deceit." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii). A district court ordering restitution under the MVRA or other statutory authority must "order restitution * * * in the full amount of each victim's losses as determined by the court," 18 U.S.C. 3664(f)(1)(A), and, "in determining the amount of restitution," may not consider the "fact that a victim has received or is entitled to receive compensation" from "any other source." 18 U.S.C. 3664(f)(1)(B). If the victim's losses are not ascertainable by a date ten days before sentencing, the court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). See generally *Dolan* v. *United States*, 130 S. Ct. 2533, 2538-2541 (2010) (concluding that a court's failure to comply with the 90-day deadline "does not deprive the court of the power to award restitution").

a. After the jury verdict finding Petters guilty but before sentencing, the government moved to defer the issue of restitution until 60 to 90 days after sentencing because of the difficulty of identifying all of the victims and their respective losses from Petters's extensive and lengthy scheme. 08-cr-364 Doc. 370, at 1-2. The district court granted that motion. 08-cr-364 Doc. 375.

On April 8, 2010, the district court sentenced Petters to 50 years of imprisonment and ordered Petters to forfeit to the United States specified property plus a $3.522 billion forfeiture judgment. 08-cr-364 Doc. 400, at 2, 6 (judgment incorporating preliminary order of forfeiture,

08-cr-364 Doc. 395).[1] On the same day, the court granted the government's request to establish a restitution schedule by setting a restitution hearing for June 9, 2010; directing the government to file a preliminary proposed restitution order six weeks beforehand; permitting victims a two-week period to submit objections to the government; requiring the government to file a final proposed restitution order after considering those objections and to provide the court with any unresolved objections; and permitting the defendants to object to the final proposal before the June 9 hearing. 08-cr-364 Doc. 398.

Meanwhile, the Probation Office had prepared a presentence investigation report (PSR) that identified 338 victims—including individuals, hedge funds, retirement funds and other sophisticated business entities—eligible for restitution. Pet App. 7 & n.3. Although the PSR estimated the total amount of restitution at $1.8 billion, it specified a loss amount for only about half of the listed victims (the victims that had contacted the probation officer) and failed to identify any loss amount for the others. *Id.* at 7; PSR ¶ 188; *id.* at S.1-S.9 (victim list).

On April 28, 2010, the government filed its preliminary proposed restitution order, which listed 434 victims and sought nearly $2 billion in restitution. 08-cr-364 Docs. 410 and 411. The government used a "cash in/cash out" methodology to determine victim status by calculating the funds invested by a potential victim and subtracting any payments that the individual or entity had received back. Pet. App. 9 n.5. As a result of that meth-

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[1] Petters's appeal from his conviction and sentence is pending. *United States* v. *Petters*, No. 10-1843 (8th Cir.) (argued Feb. 17, 2011).

odological approach, the government's restitution list identified a different set of victims and different amounts owed those victims than the PSR had done. *Id.* at 8. The government noted that some of the information was different from that in the PSR, but explained that it had used the information "currently available," some of which "may be incomplete." *Ibid.* Nearly 100 victims subsequently submitted objections to the government. See *id.* at 8-9. After considering those objections, the government filed its final proposed restitution order, which accepted some of those objections, included approximately 40 newly identified victims, and sought more than $2.5 billion in restitution. *Id.* at 9; 08-cr-364 Doc. 456 & Exh. A. Petitioners objected to that final proposal on the ground that it should have been limited to victims who directly invested in or loaned money to Petters. 08-cr-364 Doc. 461.

b. On June 3, 2010, six days before the scheduled restitution hearing date, the district court, acting *sua sponte*, issued an order declining to order restitution for any of the victims. Pet. App. 6-18. The court based its order on 18 U.S.C. 3663A(c)(3), which provides an exception from the MVRA's general requirement of mandatory restitution in certain contexts. See Pet. App. 17. The exception provides that the MVRA shall not apply in cases involving certain offenses against property, including "any offense committed by fraud or deceit," 18 U.S.C. 3663A(c)(1)(A)(ii), if the court finds, from facts on the record, that "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3)(B).

The court explained that although the MVRA generally requires district courts to order restitution in cases covered by the statute, "Congress [had] made clear" through the complexity exception in Section 3663A(c)(3)(B) that "district courts should not be saddled by complicated fact-finding with regard to victim loss when ordering restitution." Pet. App. 12-13. Such efforts run the risk, the court observed, of improperly converting sentencing proceedings into "complicated, prolonged trials" and embroiling sentencing courts in "'intricate issues of proof' related to restitution." *Id.* at 13 (emphasis and citations omitted). The exception's textual requirement that the sentencing court determine that "complex issues of fact related to the cause or amount of the victim's losses" would so "complicate or prolong the sentencing process" that "the need to provide restitution to any victim is outweighed by the burden on the sentencing process," *id.* at 12-13 (quoting 18 U.S.C. 3663A(c)(3)(B)), the court concluded, requires that courts to "weigh[]" the "burden of adjudicating the restitution issue" against the "desirability of immediate restitution," *id.* at 16 (emphasis omitted). The district court found that the exception's application to this case to be "particularly apt." *Id.* at 14.

First, the district court concluded that the burden of determining restitution here "would be significant." Pet. App. 16. The court noted that Petters's five-week trial "involved scores of boxes (and millions of pages) of documents" and explained that the "evidentiary hearings" needed to resolve objections to the government's proposed restitution order in this "multi-billion-dollar" fraud case involving nearly 500 identified victims would be "a lengthy and complicated process at best." *Id.* at 6 n.2, 8-9 & n.4, 12. Ordering restitution "would take sig-

nificant time and would be inherently complex," requiring, in the court's estimation, "*at least*" two additional months beyond that already invested "to marshal the necessary evidence, resolve all of the many pending objections, and determine the appropriate amount of restitution for each victim." *Id.* at 14. Such a process, the court concluded, would "prolong[] the matter for an intolerable period of time." *Id.* at 17 (citation and brackets omitted).

On the other side of the balance, the court found that "the burden imposed on the victims by declining restitution would not be overwhelming." Pet. App. 17. It explained that the "end result would be meager" even if it were to "wade into this thicket in an attempt to determine the appropriate amount of restitution for each victim" because the victims would "at best" recover "something less than a penny for each dollar of victim loss." *Id.* at 14-15 (noting that assets available for restitution totaled roughly $10-$20 million for the "more than $2 billion in restitution sought"). The "probable value" of restitution, the court concluded, was therefore "limited." *Id.* at 15. Moreover, restitution would likely leave the most needy victims—"unsophisticated individual investors who saw their life savings" dissolve—to "recover the smallest amounts" because institutional "hedge funds and similar entities" suffered "the vast majority of losses." *Ibid.* In other words, the "benefits of a restitution order * * * would be minimal in the overall scheme of this case." *Id.* at 17.

Finally, the district court "note[d]" that "alternative avenues of recovery are available to victims." Pet. App. 15. The government, it observed, had indicated that it would invoke its authority under 28 C.F.R. Part 9 "to remit forfeited assets" to victims to "make up for [their]

loss[es]." Pet. App. 15 & n.9. That process would provide victims with the "opportunity to seek restitution from the same funds from which the Court-ordered restitution would be made." *Id.* at 15-16. The district court also noted that "bankruptcy proceedings involving [Petters's] companies are currently pending"; that the United States Trustee "plans to assist all victims . . . in filing a bankruptcy claim"; that "many victims have already asserted [bankruptcy] claims"; and that "the funds available for distribution in the bankruptcy proceedings likely will far outpace those available here" because "'clawbacks' and similar litigation are to take place" in the bankruptcy. *Id.* at 16-17.

The district court accordingly held that Section 3663A(c)(3)(B)'s exception applied in the *Petters* case and emphasized that its decision was "base[d] * * * on the complexity and length of the restitution process." Pet. App. 17, 18 n.11.

c. The Crime Victims' Rights Act of 2004 (CVRA), 18 U.S.C. 3771 (2006 & Supp. III 2009), provides crime victims with a series of statutory rights, including the "right to full and timely restitution as provided in law," 18 U.S.C. 3771(a)(6). The CVRA states that such rights "shall be asserted in the district court in which a defendant is being prosecuted" and specifies that the "district court shall take up and decide any motion asserting a victim's right forthwith." 18 U.S.C. 3771(d)(3). "If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus" and the court of appeals must decide the petition "within 72 hours after the petition has been filed." *Ibid.* "If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." *Ibid.*

Petitioners did not file a motion in district court in the *Petters* case asserting a right to restitution under the CVRA or MVRA, either before or after the district court's June 3, 2010, restitution order. On June 10, 2010, six of the eight petitioners in this Court (Pet. ii) nevertheless petitioned the court of appeals for a writ of mandamus to vacate the restitution order; to direct the district court "to trim the list of victims to 'direct victims,'" *i.e.*, victims "who were parties to promissory notes signed by Petters and/or his companies" or can "show standing to file some other cause of action against Petters"; and to require the court to hold a restitution hearing to determine their losses. 10-2286 Mandamus Pet. i-ii, 29.

d. In separate prosecutions, Petters's six associates pleaded guilty and were convicted. Gov't *Petters* Br. 3-4, 14-15, 19-20. The district court entered two orders declining to order restitution in those cases, expressly adopting and incorporating its restitution order in *Petters*. First, on June 4, 2010, the court declined to order restitution in *White*, *Catain*, *Coleman*, and *Reynolds*. Pet. App. 19-20. Six of the eight petitioners in this Court then petitioned the court of appeals for a writ of mandamus to vacate the June 4 order. 10-2365 Mandamus Pet. i-ii, 1, 24. Second, on July 2, 2010, the district court declined to order restitution in *Katz* and *Bell*. Pet. App. 21-22. Petitioners again filed a mandamus petition in the court of appeals, now seeking vacatur of the July 2 order. 10-2582 Mandamus Pet. 1, 23. Petitioners did not file a district court motion in any of the six cases asserting a right to restitution under the MVRA or CVRA before they petitioned for mandamus relief.

3. On August 3, 2010, the court of appeals denied petitioners' three mandamus petitions in a consolidated judgment. Pet. App. 3-5. The judgment (from which petitioners now seek review) states: "The petitions for writ of mandamus have been considered by the court and are denied." *Id.* at 4.

4. Meanwhile, sentencing proceedings continued in Petters's co-defendants' cases. Petitioners submitted a motion in the six cases involving Petters's co-defendants (but not in *Petters* itself) seeking vacatur of the restitution orders in those cases. See 08-cr-304 Doc. 34, at 1-2, 19-20 (docketed only in *Coleman*). Petitioners dedicated one half of one sentence to assert in passing that "the fact that a victim is entitled to compensation from other sources may not even be considered in determining restitution. 18 U.S.C. § 3664(f)(1)(B)." *Id.* at 12. During Coleman's sentencing hearing the district court appears to have orally denied that motion, at least in the context of the *Coleman* case. See Pet. App. 26-27. Petitioners then filed their (fourth) mandamus petition in the court of appeals, challenging "the September 2 order denying [petitioners'] motion vacate" the restitution orders. 10-3050 Mandamus Pet. i, 2.

5. On September 24, 2010, the court of appeals denied mandamus relief. Pet. App. 1-2. The court's judgment (again issued without calling for the government to respond and without an accompanying opinion) states that the "[p]etition for mandamus has been considered by the court and is denied." *Id.* at 1.

ARGUMENT

Petitioners present two questions for this Court's review: first, whether a district court may deny restitution based on the availability of alternative avenues for

victims to secure recovery (Pet. 9-22); and, second, whether the court of appeals' summary denial of petitioners' mandamus petitions violated the "written opinion" requirement in 18 U.S.C. 3771(d)(3) (Pet. 22-24). No review is warranted. This case does not squarely present the first question, and the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. With respect to the second question, the statutory requirement of a "written opinion" does not apply to court of appeals' denial of petitioners' first three mandamus petitions, and to the extent that it applies in part to the court's denial of petitioner's fourth mandamus petition, no review is warranted. The court of appeals did not err in denying mandamus relief, and there is no indication that its disposition without an opinion reflects a recurring, systemic problem that would warrant certiorari review.

1. Section 206(a) of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, generally requires that a district court order restitution to a victim when the defendant is convicted of a qualifying federal offense, 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1), but specifies that that requirement does not apply in cases involving certain property offenses "if the court finds, from facts on the record, that * * * determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3)(B); see 18 U.S.C. 3663A(c)(1)(A)(ii). Petitioners assert that the "district court here held that the burden of determining the amount of restitution due would outweigh 'the need to provide restitution' because 'alternative avenues of

recovery are available to victims.'" Pet. 10 (quoting Pet. App. 15). Petitioners then contend (Pet. 9-22) that review is warranted because the court of appeals "summarily ratified" the district court's holding and that decision "implicates an acknowledged circuit split." Pet. 10. Petitioners are incorrect. No review is warranted for multiple reasons.

a. First, this case does not squarely present the question that petitioners frame. The district court did not, as petitioners contend, hold that "the burden of determining the amount of restitution due would outweigh 'the need to provide restitution' because 'alternative avenues of recovery are available to victims,'" Pet. 10 (quoting Pet. App. 15). Rather, the district court invoked the MVRA's complexity exception because the burden of calculating restitution for nearly five hundred victims in this sprawling, multi-billion-dollar fraud outweighed the need to order what ultimately would be a "meager" restitution recovery, involving, "at best, * * * less than a penney for each dollar of victim loss." Pet. App. 14-15. The court went on to "note[]" in the following paragraph that "alternative avenues of recovery are available to victims." *Id.* at 15. But that was not the determining factor in the court's holding. While the court referred to both factors in its ensuing discussion, *id.* at 16-17, the court's judgment was independently supported by its conclusion that the delay and burden in determining restitution would outweigh the need to provide what would, at the end of the day, be restitution for only a tiny fraction of losses that would largely bypass "the victims needing it most." *Id.* at 15.

The court of appeals' unelaborated judgments denying mandamus relief (Pet. App. 1-2, 3-5) provides no occasion for resolving the question petitioners present.

The court of appeals need not have conducted de novo review to deny mandamus relief and therefore need not have accepted the district court's rationale in its entirety to dispose of these cases. It would have been sufficient for the court to find no abuse of discretion, which was clearly the case in view of the massive labor entailed in quantifying victim losses for relatively small returns. In any event, the court of appeals' judgments were issued without opinions and, for that reason, do not constitute precedential rulings that might resolve a question warranting this Courts' review. See 8th Cir. R. 32.1A, 47B.

b. Even if the court of appeals had embraced the view that a district court "may deny restitution under the MVRA based on the availability of other remedies for possible victim compensation," Pet. 10, such a holding would not warrant the Court's review because it would not conflict with any decision of this Court or any other court of appeals. The only circuit squarely to address the issue has held that district courts are not "barred from considering the existence of [such alternative remedies] in determining whether to invoke the MVRA's complexity exception." *United States* v. *Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008), cert. denied, 129 S. Ct. 2026 (2009).

In *Gallant*, the Tenth Circuit explained that MVRA prohibits district courts from considering the fact that a victim has received, or may receive, compensation from other sources "in determining the amount of restitution," 18 U.S.C. 3664(f)(1)(B), but it concluded that that prohibition "relates to *how much* restitution should be awarded once the sentencing court has determined that an award is required," not "*whether* a court must provide a restitution award." 537 F.3d at 1253. The

MVRA's complexity exception, *Gallant* reasoned, concerns only the former and, for that reason, it is unaffected by the prohibition in Section 3664(f)(1)(B). *Ibid.*

Although *Gallant* stated (537 F.3d at 1253 n.36) that its conclusion "may conflict" with the Ninth Circuit's decision in *United States* v. *Cienfuegos*, 462 F.3d 1160 (2006), the two decisions do not conflict. In *Cienfuegos*, the district court denied the government's request for restitution in the form of lost earnings for the family of a murder victim, based on the district court's view that "the complexities associated with determining future lost income belong in a civil action brought by the survivors." *Id.* at 1161-1162. The Ninth Circuit reversed because the "MVRA made the 'complexity exception' inapplicable to crimes of violence" like murder. *Id.* at 1168; see *ibid.* (explaining that Section 3663A(c)(3)(B) extends the exception only to "offenses listed under 18 U.S.C. § 3663A(c)(1)(A)(ii)"). That ruling reflects the statute's text: the complexity exception expressly applies only to offenses "described in paragraph (1)(A)(ii)" of Section 3663A(c), see 18 U.S.C. 3663A(c)(3), and that paragraph encompasses only certain "offense[s] against property," 18 U.S.C. 3663A(c)(1)(A)(ii), not crimes of violence.

The *Cienfuegos* court noted that, "[i]n addition," the "the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution" under the MVRA. 462 F.3d at 1168. But, as *Gallant* recognized, that aspect of the decision "is somewhat ambiguous" because it focuses on "*the amount of restitution*," rather than on whether the MVRA requires the court to enter any order of restitution (regardless of amount). *Gallant*, 537 F.3d at 1254 n.36. The Ninth Circuit has yet to confront that ambiguity or consider

Gallant's analysis. *Cienfuegos* thus does not create a clear conflict of authority that would warrant review.[2]

Petitioners suggest (Pet. 11-12) that decisions by the First and Fourth Circuits reflect a circuit conflict, but neither even addresses the MVRA's complexity exception. In *United States* v. *Alalade*, 204 F.3d 536 (4th Cir.), cert. denied, 530 U.S. 1269 (2000), the court held that where a court actually awards restitution, 18 U.S.C. 3664(f)(1)(A) prohibits the court from reducing the *amount* of that restitution by the value of property seized and retained in administrative forfeiture by the government. *Id.* at 540; see *id.* at 540-541 (holding that "the district court lacked discretion under the MVRA to order restitution in this case in an amount less than the full amount of each [victim's] loss by allowing an offset for the value" of the seized property). *United States* v. *Hyde*, 497 F.3d 103 (1st Cir. 2007), is even further afield. The court in *Hyde* concluded that statutory provisions governing the *enforcement* of a previously entered restitution order were not limited by a state-law exemption that normally would exempt property from the reach of bankruptcy creditors. *Id.* at 107-108. In short, petitioner identifies no division of authority that might warrant review.

2. Petitioners contend (Pet. 22-24) that the court of appeals' two summary denials of their mandamus petitions violate the "written opinion" requirement of 18 U.S.C. 3771(d)(3). That requirement did not apply to

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[2] Petitioners' reliance (Pet. 11) on *United States* v. *Edwards*, 595 F.3d 1004, 1013 & n.3 (9th Cir. 2010), underscores the absence of Ninth Circuit precedent on point. *Edwards*, which discusses the MVRA in the context of a bankruptcy case simply to contrast the MVRA's provisions with the principles governing a bankruptcy court, does not even address the MVRA's complexity exception. *Ibid.*

the first denial (Pet. App. 3-5) and, although the court of appeals should have issued an opinion when denying petitioner's fourth mandamus petition (*id.* at 1-2), that isolated failure does not warrant this Court's review.

a. The Crime Victims' Rights Act of 2004, 18 U.S.C. 3771 (2006 & Supp. III 2009), provides crime victims with a series of statutory rights that must "be asserted in the district court," which must promptly "decide any [such] motion." 18 U.S.C. 3771(d)(3). The CVRA states that "*[i]f* the district court *denies* the relief sought, the *movant* may petition the court of appeals for a writ of mandamus." *Ibid.* (emphasis added). The court of appeals must then decide such a petition "within 72 hours" and, if it denies mandamus relief, must state its reasons "in a written opinion." *Ibid.* The CVRA's "written opinion" requirement thus applies only to mandamus petitions filed by a litigant (the district court "movant") who filed a district court motion asserting rights under the CVRA that the district court denied. Petitioners did not file any such motion to support their first three mandamus petitions, see pp. 10-11, *supra*, and, for that reason, the court of appeals was not obliged to issue a written opinion to explain its judgment (Pet. App. 3-5) denying the petitions.[3] Indeed, petitioner appears to have acknowledged as much below. See 10-3050 Mandamus

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[3] Six of the eight petitioners in this Court submitted a letter dated June 11, 2010, to the district court in *White*, *Catain*, *Coleman*, and *Reynolds* "ask[ing]" that the district court act "sua sponte" to "vacate [its] order denying restitution on behalf of Petters's codefendants." 08-cr-299 Doc. 33, at 1-2 (letter filed Sept. 8, 2010); see 08-cr-302 Doc. 45 (same); 08-cr-304 Doc. 39 (same); 08-cr-320 Doc. 47 (same). That letter was not at the time docketed by the district court, which does not appear to have treated petitioners' suggestion that the court itself act *sua sponte* as a motion for relief warranting adjudication.

Pet. 2, 8 (stating that petitioners "presume[d]" that their three mandamus petitions were denied because petitioners "did not have a record that [they] had first filed a motion asserting CVRA rights in the district court which had been denied"). No further review of that judgment is warranted.

b. After their first three mandamus petitions were denied, petitioners submitted a motion in district court in six of the cases at issue (not the *Petters* case) asserting rights under the CVRA. See 08-cr-304 Doc. 34, at 1-2, 19-20 (docketed only in *Coleman*). On September 2, 2010, the district court appears to have orally denied that motion at least in the context of the *Coleman* prosecution. Pet. App. 26-27 (*Coleman* sentencing hearing transcript).[4] The court of appeals later denied petitioners' (fourth) mandamus petition resulting from that September 2 ruling. Pet. App. 1-2; p. 11, *supra*. The court of appeals should have issued at least a brief, written opinion to explain its judgment denying mandamus relief to the extent that it denied relief in the six cases involving Petters's co-defendants.[5] Although the court

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[4] No separate order denying the motion was entered or noted in *Coleman* or in any other related case.

[5] If the court of appeals had denied mandamus relief in Petters's case, the CVRA would not have required the court to explain its denial because petitioners never filed a district court motion that would have triggered that obligation. And with respect to the cases in which petitioners properly filed such a motion, the "written opinion" requirement does not necessarily require the court of appeals to issue a lengthy decision (particularly in view of the rapid 72-hour window within which such decisions must be issued). Nor does it otherwise prevent a court, in an appropriate case, from indicating that it adopts the reasoning of the lower court or accepts the arguments and positions advanced by a respondent's court-ordered answer to the mandamus petition. The court of appeals' failure here to provide any reasons for

of appeals erred in that regard, certiorari review in this case is not warranted.

This Court's review is not necessary to clarify the law. Section 3771(d)(3) unambiguously requires a court of appeals to issue a written opinion when it denies relief to a litigant who has properly sought mandamus review from the district court's denial of its CVRA motion. Although the court of appeals overlooked that clear requirement in this case, nothing suggests that that failure reflects a recurring, systemic problem that would warrant review. The more appropriate means for correcting such an isolated, case-specific error in an unpublished judgment by the court of appeals would have been for petitioners to bring that error to the panel's attention in a rehearing petition.

Although this Court of course has discretion to grant certiorari, vacate the court of appeals' September 24, 2010, judgment, and remand (GVR) in order to correct the court of appeals' failure to explain that judgment, that course is unwarranted here because it would not alter the underlying judgment denying mandamus relief.[6] The United States sought restitution on behalf of nearly 500 victims in the prosecutions at issue, which involve a massive, multi-billion-dollar fraudulent scheme. Notwithstanding the government's request, the district court permissibly determined that the substantial burden of determining the amount of restitution

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its judgment, however, is insufficient.

[6] Cf. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978) (state court's decision to grant the prosecution's request for a mistrial is not constitutionally defective because of the court's "failure to explain [its] ruling" by articulating the factors informing "the deliberate exercise of [its] discretion" if the "record provides sufficient justification" for the ruling).

owed to each victim and resolving the numerous objections to the government's proposed restitution order would take a significant amount of time, would be inherently complex, and would impose a significant burden that would intolerably delay the sentencing process. See pp. 7-8, *supra*. In light of the meager restitution that would be recovered, the district court determined that the "need to provide restitution" was "outweighed by the burden it would impose" on the sentencing process. Pet. App. 17; see *id.* at 19-22 (incorporating that conclusion). That did not reflect an abuse of discretion, and, for that reason, the court of appeals did not err in denying mandamus relief in this case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011

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[7] Petitioners argued below that the district court's application of the MVRA's complexity exception should be reviewed for an abuse of discretion and not the higher standard traditionally applied to mandamus relief. 10-3050 Mandamus Pet. 10-12, 17-21. The courts of appeals are divided over whether traditional mandamus standards apply in the CVRA context. See *United States* v. *Monzel*, No. 11-3008, 2011 WL 1466365, at *3 (D.C. Cir. Apr. 19, 2011) (noting conflict). Even under the lower standard that petitioner suggests, the court of appeals did not err in denying mandamus relief in this case.

(6)

MAY 20 2011

No. 10-738

IN THE

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

What is most striking about the four briefs in opposition is that none even attempts to defend the rulings below with respect to *either* of the questions presented. None of the respondents claims that the Mandatory Victim Restitution Act (MVRA) allows a district court to deny restitution – as the court did here and as the Tenth Circuit has held over the Government's objection – based in part on the belief that "the victims have alternative avenues of relief available to them." Pet. App. 17; *accord United States v. Gallant*, 537 F.3d 1202, 1254 (10th Cir. 2008).[1] As for the second question presented, Respondent Petters and the Government affirmatively concede that the Eighth Circuit violated the Crime Victims Rights Act (CVRA) in denying mandamus without providing reasons in a written opinion. Petters BIO 12; Gvt. BIO 18-19.

Respondents nevertheless urge this Court to deny certiorari based on various grounds. None of their arguments withstands scrutiny. Contrary to respondents' primary contentions, the district court's

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[1] Respondent Petters argues at one point that "[t]he plain language" of the MVRA allows "a sentencing court to invoke the MVRA's complexity exception to deny restitution . . . ." Petters BIO 6 (internal quotation marks and citation omitted). But the issue here is not whether a district court may invoke the complexity exception. Rather, the issue is whether a district court that is invoking the complexity exception may consider the availability of alternative remedies in conducting the balancing test that the exception requires. Neither Petters nor any other respondent argues that a district court may do *that*.

decision plainly rests in part upon the perceived availability of alternative remedies. Petitioners clearly did not waive their right (even if such a waiver were possible) to have the Eighth Circuit provide reasons for its ruling in a written opinion. And the errors committed by the courts below not only affected the outcome here but also thwart Congress' carefully designed system of victim participation and appellate review under the CVRA.

It is worth reiterating that the district court's decision – and the Eighth Circuit's refusal to upset it – passes over at least "$10-20 million" of ill-gotten assets "available for restitution." Pet. App. 15. If this result in a case involving massive criminal fraud is allowed to stand, then Congress accomplished nothing by enacting the MVRA and the CVRA. This Court should grant certiorari and, at a minimum, summarily reverse and direct the Eighth Circuit to abide by the requirements of those Acts.

ARGUMENT

I. This Court Should Grant Certiorari to Hold That a Court May Not Deny Restitution Based in Part on the Availability of Alternative Remedies.

1. Respondent Bell (but not the Government or any other respondent) argues that petitioners waived the alternative remedies issue because they "never objected to the district court's consideration of alternative remedies." Bell BIO 4. This is incorrect. Petitioners expressly argued that "the fact that a victim is entitled to compensation from other sources may not even be considered in determining restitution" under the MVRA. Motion to Vacate

Restitution Order in No. 08-cr-304, Doc. 34, at 12. Petitioners also argued in other filings that the availability of alternative remedies was legally irrelevant. *See* Ritchie's Memorandum in Support of Victim Impact Statement, submitted in camera Feb. 24, 2010, at 28-29 (arguing that remission is irrelevant); Ritchie's Supplemental Memorandum in Support of Ritchie's Victim Impact Statement, submitted in camera March 19, 2010, at 4-10 (same); Ritchie's Reply in Support of Emergency Motion to Intervene, Doc. 438, at 7 (same).

2. Respondent Petters and the Government try to avoid review regarding the district court's reliance on alternative remedies by asserting that this was "not the determining factor" in the court's denial of restitution. Gvt. BIO 13; *see also* Petters BIO 7 (reliance on alternative remedies "was not a major consideration in the district court's reasoning"). "[T]he court's judgment," the Government even suggests, "was independently supported" by its assertion that any restitution would ultimately be roughly "'a penny of each dollar of victim loss.'" Gvt. BIO 13 (quoting Pet. App. 15); *see also* Petters BIO 7. These suggestions miss the mark on two levels.

First, the district court's decision plainly depends on its belief that petitioners may seek alternative remedies. The court asserted that the MVRA's complexity exception "calls for . . . a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case *against the burden that would be imposed on the victim by leaving him or her to other available legal remedies.*" Pet. App. 16 (internal quotation marks and citation omitted) (emphasis added). The court also twice

discussed alternative remedies (among other factors), Pet. App. 15-16 & 17, before concluding "[f]or these reasons" that "the need to provide restitution is outweighed by the burden it would impose." Pet. App. 17.

When a district court "relie[s] on [a] factor[] that may not be considered," it commits an error of law that is *per se* an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). Given that the MVRA precludes considering alternative remedies as part of the complexity exception's balancing test, the Eighth Circuit should have granted mandamus relief and ordered the district court to reassess the balance.

Second, there is every reason to believe that the outcome would have been different if the district court had known that it could not rely on alternate remedies. It obviously would require some judicial effort to calculate the proper amount of restitution. But much of the work has already been done. An independent accounting firm commissioned by the Receiver, for example, has already conducted a forensic accounting report showing the net losers (that is, the victims) from Petters' scheme and how much each is owed.

On the other hand, the only reason besides alternative remedies that the district court gave for finding that the burden of adjudicating restitution would outweigh the need to impose it was its belief, based on the defendants' current financial condition, that petitioners would be able to recover only about a "penny of each dollar" of their loss. Pet. App. 15. But petitioners lost over $165 million in the defendants' Ponzi scheme. Pet. for Cert. 3. That means that, even accepting the district court's initial estimations

regarding the defendants' assets, petitioners stand to recover roughly *$1.65 million*. This is hardly an insubstantial amount of money. Furthermore, a restitution order for the full amount of petitioners' losses would allow them to recover any additional amounts recovered in ongoing asset recovery proceedings,[2] or that the defendants earn over the next 20 years. *See* Pet. for Cert. 17, 19. These guaranteed and potential recoveries, which far exceed the stakes of a typical multi-year case in a federal district court, surely are worth a reasonably material expenditure of judicial resources.

3. The Government suggests that this Court should deny review because the Eighth Circuit's decisions affirming the district court are "unelaborated" and were "issued without opinions," and, therefore, do not "constitute precedential rulings." Gvt. BIO 13-14. To put it mildly, this suggestion is ironic in light of the Government's acknowledgement three pages later that "the court of appeals should have issued a written opinion" to explain its judgment because 18 U.S.C. § 3771(d)(3) "unambiguously requires a court of appeals to issue a written opinion when it denies relief to a litigant who has properly sought mandamus review of the district court's denial of its CVRA motion." Gvt. BIO 17, 19.

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[2] Given the extent of Petters' fraudulent enterprises, as well as the lengths to which he and his confederates went to conceal them and to hide their assets, it would not be at all surprising for these proceedings to uncover tens or even hundreds of millions in additional assets hidden in overseas bank accounts or other devices.

The fact that the Eighth Circuit's opinion violates the CVRA, as well as the MVRA, increases, not decreases, the need for review.

At any rate, the Government acknowledges that the Tenth Circuit has "squarely . . . held" that district courts may deny restitution based in part on the availability of alternative remedies. Gvt. BIO 14 (citing *United States v. Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008)); *accord* Petters BIO 7. Many district courts have held likewise. Pet. for Cert. 13-14. Surely this is enough "predecent[]" to warrant expending this Court's resources to correct a construction of the MVRA that neither the Government nor any other respondent is willing to defend.

4. Finally, Petters and the Government dispute petitioners' assertion (Pet. for Cert. 10-12) that decisions from the Ninth, First, and Fourth Circuits conflict with the Tenth Circuit's *Gallant* decision and the result here. Given that respondents are unwilling even to argue that courts may consider alternative remedies, it is not terribly important that petitioners show that some courts have rejected this erroneous view of the law. At any rate, the circuits are indeed in conflict.

The Government asserts that the Ninth Circuit's decision in *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), does not unambiguously conflict with the result here because language in the opinion "focuses on '*the amount of restitution*,' rather than on whether the MVRA requires the court to enter any order of restitution (regardless of amount)." Gvt. BIO 15. The district court in *Cienfuegos*, however, had denied restitution entirely – not reduced the amount

– based on part on the availability of alternative remedies. 462 F.3d at 1163 So the Ninth Circuit's reversal of that opinion can be understood only as holding that a court may not consider alternative remedies in deciding whether to impose restitution.

More generally, even if the Ninth Circuit had been thinking only of the amount of restitution, the Government offers no reason why the MVRA would bar consideration of alternative remedies in calculating the amount of restitution, but allow such consideration in determining whether to award it in the first place. Nor does any logical reason exist.

Respondents also note that neither the Fourth Circuit's decision in *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000), nor the First Circuit's decision in *United States v. Hyde*, 497 F.3d 103 (1st Cir. 2007), involved the MVRA's complexity exception. Gvt. BIO 16; Petters BIO 8. This factual distinction is true enough. But, as the Government concedes, both decisions prohibit courts as a matter of law from considering the availability of alternative remedies in applying other provisions of the MVRA. *See* Gvt. BIO 16; Pet. for Cert. 11-12. And there is no apparent reason – and respondents offer none – why the MVRA would bar consideration of alternative remedies for some purposes but allow such consideration in deciding whether to undertake a restitution proceeding in the first place. Accordingly, it is apparent that this case would have come out differently in either of those courts.

II. This Court Should Grant Certiorari to Enforce the CVRA's Written Opinion Requirement.

1. Petters (but not the Government or any other respondent) asserts that even though petitioners made "a handful of references to the written opinion rule in their Petition for Mandamus," petitioners failed to preserve the issue for review in this Court because they did not list it in the "list of issues" in their brief to the Eighth Circuit. Petters BIO 10-11. This argument is specious. Litigants do not have to raise separate issues in their appellate briefs asking courts of appeals to follow basic appellate procedural rules (not even applicable in district courts) like the MVRA's written opinion rule – particularly when, as here, opposing litigants never ask the court to ignore the rule and the court gives no prior indication of its intent to do so.

At any rate, petitioners told the Eighth Circuit that "[p]ursuant to the Crime Victims Rights Act, . . . '[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.' 18 U.S.C. § 3771(d)(3)." C.A. Br. in No. 10-3050 at 3. Petitioners further complained to the Eighth Circuit that it had denied its previous petitions for mandamus "without the separate opinion required by 18 U.S.C. § 3771(d)(3)," leaving them in a situation in which they could "only guess why it was denied." C.A. Br. in No. 10-3050 at

8. There is no basis for the notion that they were required to say anything more.[5]

2. Petters argues that a petition for certiorari "is not the appropriate vehicle" for review here because petitioners "seek to compel a lower court to perform a claimed mandatory duty." Petters BIO 11. Petters is mistaken. As the Government acknowledges, Gvt. BIO 2, this Court has jurisdiction under 28 U.S.C. § 1254(1), because petitioners seek review of a final judgment of a federal court of appeals. It makes no difference that petitioners seek review of a denial of a petition for mandamus. *See, e.g., Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 376-77 (2004) (granting certiorari under § 1254(1) to review, and then reversing, a court of appeals' denial of mandamus); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (same).

By contrast, the "mandatory duty" procedure that Petters mentions is reserved for the circumstance in which a party that has prevailed in this Court seeks to compel an intransigent lower court to "execute [this Court's] mandate." *Vendo Co. v. Lektro-Vend Corp*, 434 U.S. 425, 427-28 (1978)

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[5] The Government's suggestion (Gvt BIO 19) that petitioners should have sought rehearing in order to justify obtaining review in this Court is likewise unfounded. This Court has never held that it is necessary for a litigant to seek rehearing before seeking certiorari in this Court. At any rate, petitioners expressly pointed out the written opinion rule to the Eighth Circuit and complained of its refusal to abide by it in the past. There would have been no use in complaining yet again.

(quoting *United States v. Fossatt*, 21 How. 445, 446 (1859)). That obviously is not the situation here.[4]

3. Petters and the Government lastly suggest that certiorari is unwarranted because "the statute is clear on its face" that a court of appeals must issue a written opinion with reasons if it denies mandamus relief under the CVRA. Petters BIO 12; Gvt. BIO 19 (noting that the statute is "unambiguous[]"). The Government adds to this that "nothing suggests that [the Eighth Circuit's refusal to issue a written opinion] reflects a recurring, systematic problem." Gvt BIO 19.

These assertions, however, support *granting* certiorari, not denying it. This Court's rules provide

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[4] The Government also asserts that "Petitioners did not file any [motion in the district court] to support their first three mandamus petitions." Gvt. BIO 17. This assertion is misleading. During the *in camera* restitution process ordered by the court pursuant to 18 U.S.C. § 3664(d)(4), petitioners submitted several motions asserting their right to restitution under the MVRA (arguing, among other things, that that the availability of other remedies, such as discretionary remission, could not substitute for their mandatory restitution rights), and requesting a hearing under the CVRA. *The court*, however, did not file them. Later, petitioners submitted additional motions to the district court objecting to its refusal to award restitution, but again *the court* refused to file them. Pet. for Cert. 7 & n 2.

In any event, the Government itself recognizes that this procedural history is irrelevant to this Court's ability to review this case and award the relief petitioners seek, for petitioners also submitted, and the district court duly filed and denied, a motion supporting its mandamus petition that produced the Eighth Circuit's ruling of September 24, 2010. Gvt BIO 18, Pet. App. 1-2.

that certiorari is appropriate when "a United States court of appeals . . . has so far departed from the *accepted and usual* course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a) (emphasis added). That is exactly what the Eighth Circuit's summary denial of mandamus does here. If that the Eighth Circuit's refusal to issue a written opinion also inhibits this Court's plenary review of the first question presented, then the Eighth Circuit's decision is all the more intolerable. *See supra* at 5. This Court should not allow it to stand.

III. The "Standing" Objections That Bell and Katz Raise Are Not Pertinent Here.

Finally, Respondents Bell and Katz seek to evade the effect of a reversal from this Court by arguing that petitioners lack "standing" to recover restitution from them because petitioners were not victims of their crimes. Bell BIO 6-7; Katz BIO 2. Neither the district court nor the Eighth Circuit considered this argument. Hence, it can and should be left for remand.

In any event, such an argument cannot prevail, for two reasons. First, neither Bell nor Katz raised it below, so it is waived. (Although they label the argument as one involving "standing," it is subject to waiver because it really is just a question of causation. *See, e.g., United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 462 (D.N.J. 2009).). Second, the argument lacks merit. Bell and Katz pleaded guilty to fraud in connection with the "Lancelot" scheme, and they concede that petitioners invested hundreds of millions of dollars in those

funds from 2002-05. Bell BIO 6-7; Katz BIO 2. Even though Bell's and Katz's fraudulent activity occurred later, in 2008, it still – in the words of the MVRA – "directly and proximately harmed" petitioners, 18 U.S.C. § 3663A(a)(2), by causing them to lose vast amounts of money from their investments. Neither the MVRA nor the CVRA requires anything more than that.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING PETITIONER

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MOTION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37(2)(b), the National Crime Victim Law Institute (NCVLI) submits this motion seeking permission to file an *amicus curiae* brief in support of Petitioners' Petition for Writ of Certiorari in the above-captioned case.

NCVLI sought leave of the parties to file the attached brief in support of Petitioners' Petition by email and telephone on December 22, 2010. On December 22, 2010, Jon M. Hopeman, on behalf of Thomas J. Petters, and Brenda Grantland, on behalf of Petitioners, consented to the filing. On December 23, 2010, NCVLI received notification from Fred Bruno, on behalf of Larry Reynolds, and Thomas B. Heffelfinger, on behalf of Harold Katz, that they were withholding consent to file. As of December 29, 2010, NCVLI had not received written confirmation of consent to file from any of the remaining parties, the date on which NCVLI submitted its brief to the printer.

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of

Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. NCVLI has an interest in this case because it has implications for the enforcement of all rights afforded to victims under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the rights to restitution and to effective review on appeal.

Respectfully submitted,

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Date: January 3, 2011

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. NCVLI believes that this case has important implications for the enforcement of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the rights to restitution and to effective review on appeal.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

The parties were notified ten days prior to the due date of this brief of the intention to file.

SUMMARY OF THE ARGUMENT

In this case, the crime victims filed a proper petition for review of a district court decision denying them restitution, which is a right guaranteed by the CVRA and other statutes. The Eighth Circuit denied the petition without explanation. This was done despite Congress' command in the CVRA that "[i]f the court of appeals denies the relief sought [by a crime victim under the CVRA], the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit's action directly contravenes the CVRA. Accordingly, this Court should summarily reverse the decision below and remand to the Circuit with direction that it comply with the requirements of the CVRA.

ARGUMENT

The CVRA specifically requires that "[i]f the court of appeals denies the relief sought [by a crime victim under the CVRA], the reasons for denial *shall* be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3) (emphasis added). Here, the Eighth Circuit flouted this requirement by issuing a summary denial without explanation. This contravened the plain language of the CVRA. Accordingly, the Court should summarily reverse the decision below. This Court should also write a brief opinion, providing guidance to the courts of appeals that the CVRA provision mandating written opinions must be

respected, and assurance to crime victims that their rights under the statute will be enforced.

The failure to provide "the reasons for the denial . . . in a written opinion" might seem like a mere technicality. But NCVLI has been involved in CVRA litigation around the country since passage of the Act, and can report that the lack of written decisions spawns serious problems. The field of crime victims' rights is a new and evolving one, and issues of how to enforce victims' rights are challenging federal and state courts throughout the country. *See generally* Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, VICTIMS IN CRIMINAL PROCEDURE 631-706 (3d ed. 2010) (reviewing numerous enforcement issues regarding crime victims' rights). As a result, crime victims attempting to protect their rights do not have the benefit of an established body of law interpreting their rights (in contrast, for example, to criminal defendants, who have a well developed body of case law about their rights). The CVRA's written opinion requirement addresses this lack of case law and is designed to create a body of precedents for future crime victims and courts

Congress' requirement of a written decision serves other purposes as well. If an appellate court explains in one case why a victim's assertion of rights was denied, a victim asserting rights in a subsequent case can avoid repeating errors made in the previous case. Here, for example, the victims have had several petitions summarily denied – and yet they are none the wiser as to why their petitions have been denied.

See Mandamus Petition at 8 (noting that because of previous failures of the court to provide a written opinion, the crime victims in this case were left to "guess" why their previous petitions had been denied). It is also important to remember that many victims of crime are indigent and lack legal counsel. Therefore, when, as in this case, a victim has skilled legal counsel who is able to bring a case to the appellate level, it is vital that the effort result in a written decision to benefit future crime victims who may be impecunious.

It was presumably for reasons such as these that Congress required appellate courts to produce a written opinion if denying victims' claims. Congress may have also thought that by compelling a written decision, appellate courts might more carefully work through novel issues surrounding crime victims' rights and avoid making mistakes.

The victims in this case specifically brought to the Eighth Circuit's attention 18 U.S.C. § 3771(d)(3)'s requirement of a written opinion. *See* Petition for Mandamus at 3 (quoting statutory requirement of written opinion), *id.* at 8 (noting previous failures by the court to comply with the requirement of producing a written opinion had left them "to guess" why they had been denied). Nonetheless, in clear contravention of the congressional command, the Eighth Circuit denied the petition without providing any reason – much less the "written decision" required in the CVRA.

The Eighth Circuit's failure to abide by the CVRA disrupted the appellate safeguards Congress created.

When it passed the CVRA, Congress made clear that it expected courts of appeals to act as protectors of crime victims' rights. During the floor debate on the CVRA, co-sponsor Senator Jon Kyl explained the importance of the CVRA's mandatory appellate review provision, stating: "[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights." 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004); *see also* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 Denv. U.L. Rev. 599, 625-29 (2009) (discussing the legislative history of the CVRA's appellate provisions).

The requirement of a written opinion by courts of appeals dovetails with another provision in the CVRA addressed to trial courts. The CVRA affords crime victims standing to enforce their rights in the nation's federal trial courts and requires these courts to afford victims their rights. 18 U.S.C. § 3771(b)(1). The Act then directs that "[t]he reasons for any decision denying relief under . . . [the CVRA] shall be clearly stated in the record." 18 U.S.C. § 3771(b)(1). The rationale underlying this requirement to have reasoning appear in the district court record was to ensure a proper record for appeal. *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("[R]equiring a court to provide the reasons for denial of relief is

necessary for effective appeal. . . ."). In this case, the district court properly complied with the requirement by giving reasons for rejecting the victims' claims. The entire review apparatus specified in the CVRA, however, is short-circuited by the Eighth Circuit's refusal to explain whether it agreed with the analysis of the district court below or whether it was rejecting relief for some other unexplained reason

While Congress properly did not draw distinctions between victims with significant claims and those with insignificant ones, it is important to note that the victims here had a huge stake in the disposition of their petition. The victims presented substantial claims that they had lost over $165 million dollars due to the defendant's fraud scheme. Under the CVRA and other statutes, they had both a guaranteed right to be heard, 18 U.S.C. § 3771(a)(4), and a right to "full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(7). These rights were denied in the district court, forcing the victims to seek appellate protection.[4] Whatever the ultimate merits of their

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[4] The district court felt it could deny the victims relief in this criminal case because they could pursue a later civil lawsuit. The merits of this conclusion are compellingly addressed by the victims in their petition for certiorari. NCVLI adds only that crime victims are often unable – both financially and emotionally – to participate in a civil lawsuit Financially, the cost of hiring a lawyer for a civil lawsuit is often prohibitive Emotionally, victims are harmed by delays in the final disposition of cases *See* Marilyn Peterson Armour & Mark S Umbreit, *The Ultimate Penal Sanction and 'Closure' for Survivors of Homicide Victims*, 91 Marq L Rev 381, 413 (2007) (noting that requiring victims

(Continued on following page)

claims to the Eighth Circuit, these crime victims were entitled by Congressional command to a written decision explaining the court's reasoning.

This Court could grant certiorari to review and ultimately rule upon the Eighth Circuit's refusal to follow the law; but this Court has recognized that summary reversal is appropriate for the unusual situation where "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). These conditions are all obviously and indisputably met here. The CVRA's requirement of a written opinion is not in doubt; what happened below is not in dispute; and the Eighth Circuit clearly erred in not providing a written explanation for its action. Further briefing and argument will not change or elucidate any of these facts. The Court should summarily reverse in a written opinion that will provide guidance to courts of appeals and give effect to Congress' command that crime victims are at least entitled to know why their appellate claims have been rejected.

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to endure proceedings over many years forces them to "relive the crime," which can "intensify the perception that the world is not fair or just."); Deborah P. Kelly, *Victim's Perceptions of Criminal Justice*, 11 Pepp. L. Rev. 15, 19 (1983) (noting that "[d]elay in court hinders the victim's recovery").

CONCLUSION

This Court should summarily reverse the Eighth Circuit's decision and remand with a direction to the Eighth Circuit that it comply with the CVRA's requirement that its reasoning for denying relief to the crime victims "shall be clearly stated on the record in a written opinion."

Respectfully submitted,

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